90-970

No. -

In the Supreme Court of the United States

OCTOBER TERM, 1990

LECHMERE, INC.,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

PETITION FOR WRIT OF CERTIORATI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION FOR REVIEW

Whether the National Labor Relations Board has impermissibly expanded the right of union representatives to trespass on private property beyond the limits established by the Supreme Court in *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956).

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Lechmere, Inc. ("Lechmere"),[1] respectfully petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the First Circuit ("First Circuit") to review a judgment enforcing an order of the National Labor Relations Board ("NLRB" or the "Board").

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[1] In compliance with Rule 29.1, Rules of the Supreme Court of the United States, Lechmere states the following: Lechmere, Inc. is a Massachusetts corporation wholly owned by LMR Acquisition Corp.

OPINIONS BELOW

The First Circuit's opinion has been reported at 914 F.2d 313 (1st Cir. 1990), and appears at Appendix A to this petition. The underlying decision and order of the NLRB has been reported at 295 N.L.R.B. No. 15, 131 L.R.R.M. (BNA) 1480 (1989), and appears at Appendix B. Included as part of the Board's decision is the earlier opinion and order of the Administrative Law Judge in Case No. 39-CA-3571. Finally, Lechmere filed with the First Circuit a Suggestion For Rehearing En Banc which was denied by an order of the court appearing at Appendix C.

JURISDICTION

On September 17, 1990, the First Circuit enforced the earlier order of the NLRB. The First Circuit denied Lechmere's Suggestion For Rehearing En Banc on October 25, 1990. Lechmere invokes the jurisdiction of this Court to issue a writ of certiorari under Section 10(e) of the National Labor Relations Act, as amended (the "Act"). 29 U.S.C. § 160(e); *see* 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 7 of the Act provides in part that "Employees shall have the right to self organization, to form, join, or assist labor organizations . . ." 29 U.S.C. § 157. Section 8(a)(1) of the Act provides that "[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7." 29 U.S.C. § 158(a)(1).

STATEMENT OF THE CASE

This case presents the frequently recurring question of whether labor union organizers can trespass on private property to engage in activity otherwise protected by Section 7 of the Act. For at least 30 years the Board has devised differing balancing tests to resolve the contest between "Section 7 rights" and property rights, all purporting to be based upon the only Supreme Court decision that has ever squarely addressed the issue, *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956). At issue is the Board's most recent approach.

Lechmere is a retail store chain engaged in the sale of goods other than clothing. In the summer of 1987, representatives from Local 919, United Food and Commercial Workers Union, AFL-CIO (the "Union") trespassed on private property both inside and outside Lechmere's store in Newington, Connecticut, and attempted to organize the employees. Lechmere ejected the Union organizers from the store and parking lot, and thereafter consistently excluded them from private property in and around the store.

Lechmere's actions were consistent with a strict, impartially enforced no-solicitation policy. Various groups other than the Union, including the American Automobile Association, the Salvation Army, and the Girl Scouts, had previously been excluded from soliciting on the private property at Lechmere's premises.

The Union filed an unfair labor practice charge alleging that by enforcing its property rights, Lechmere violated Section 8(a)(1) of the Act, which prohibits interference with employees' right to self-organization.

After an evidentiary hearing an Administrative Law Judge ("ALJ") found merit to this charge. He evaluated the issues under *Fairmont Hotel Co.*, 282 N.L.R.B. 139, 123 L.R.R.M. (BNA) 1257 (1986), which was at that time the Board's latest interpretation of *Babcock & Wilcox*.

Lechmere filed exceptions and the full Board considered the case. The Board affirmed the ALJ but evaluated the case under yet another new approach to *Babcock & Wilcox* issues — *Jean Country*, 291 N.L.R.B. No. 4, 129 L.R.R.M. (BNA) 1201 (1988) — which had substantially modified and partially overruled the not yet two year old *Fairmont Hotel*.

Lechmere petitioned the First Circuit for review of the Board's order, and the Board filed a cross-application for enforcement, all as permitted under Sections 10(e) and (f) of the Act. 29 U.S.C. § 160(e) and (f). The First Circuit enforced the Board's order. *Lechmere, Inc.* v. *NLRB*, 914 F.2d 313 (1st Cir. 1990) (*See* Appendix A). Judge Torruella strongly dissented.

The crucial factual issue is whether there were reasonable means available to the Union to reach Lechmere's employees, other than trespassing. If so, then Lechmere did not violate the Act by enforcing its property rights.

In the summer of 1987 there were 201 employees at the Lechmere store in Newington; 170 lived in Newington or two contiguous cities, Hartford and New Britain. Before appearing at Lechmere's property, the Union initially chose to use a full page newspaper advertisement in the Hartford Courant with the banner headline "Attention Lechmere Employees", and containing a clip-out union authorization card and the telephone number and address of the Union. That was the first in a series of five similar advertisements that the Union placed in the Hartford Courant and another local newspaper. The Union later ran five more advertisements aimed at persuading the general public not to shop at Lechmere.

The Lechmere store is bounded primarily by a highway and a grassy strip 46 feet wide. The entire grass strip is public property except the four feet closest to the parking lot. Many Lechmere employees are identifiable because they arrive for work one-half hour before morning store hours, and leave up to one-half hour after evening store hours. Employees

generally are required to park in the parking area closest to the public grass strip. The Union stationed its representatives on this grass strip for many days with written materials aimed at organizing Lechmere employees. Later, Union representatives patrolled this perimeter for several months with signs and leaflets aimed at dissuading the public from shopping at Lechmere.

In Connecticut one can obtain the name and address of the registered owner of an automobile by presenting a license plate number at the Division of Motor Vehicles. The Union used this tactic to learn the identity of 41 Lechmere employees. The Union attempted some home visits and telephone calls, and sent various mailings to the employees on this list.

From the foregoing, the Board and the First Circuit concluded that there were no reasonable alternative means for the Union to reach Lechmere's employees, and that the Union's trespass was protected under the Act. The essence of this Petition is that the First Circuit in *Lechmere, Inc.*, by following *Jean Country*, ruled in a manner that is irreconcilable with the Supreme Court's decision in *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956). *Jean Country* strays from *Babcock & Wilcox* by permitting trespass even when there are reasonable alternatives to trespass available. The result of such an accommodation is that the Court's intention that deference be given to private property rights in all but the rarest of circumstances has been slighted. Petitioner asks that the Court order the Board to reformulate the accommodation analysis in a manner that is true to *Babcock & Wilcox*. Upon such reformulation, the factual record in this case will demonstrate that Lechmere did not commit an unfair labor practice under the Act.

REASONS FOR GRANTING THE WRIT

I. BY FOLLOWING *Jean Country*, THE BOARD AND THE FIRST CIRCUIT HAVE INCORRECTLY PERMITTED TRESPASS EVEN THOUGH THE UNION HAD REASONABLE ALTERNATIVES IN ITS EFFORT TO REACH LECHMERE EMPLOYEES.

In 1956 the Supreme Court fashioned a balancing test to determine when non-employee union organizers could trespass on private property to engage in protected concerted activities. *See NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956) (a unanimous decision by eight Justices).

The Court expressly prohibited trespassing by union organizers except in situations where the target employees were inaccessible and "beyond the reach" of less intrusive, non-trespassory methods of communication, such as the mail, advertised meetings, contacts on the streets and at home, and telephone calls. *Id.* at 107 n.1, 111-14.

The *Babcock & Wilcox* Court was reviewing a 1954 NLRB decision, which dealt with union organizers' attempts to organize the workforce of a Babcock & Wilcox factory outside a small town. *Babcock and Wilcox Co.*, 109 N.L.R.B. 485 (1954). The factory was adjacent to a highway and surrounded by private property, so the union eventually sent its agents into the parking lot to meet employees face-to-face. Babcock & Wilcox did not permit this trespass and the union filed an unfair labor practice charge.

In its 1954 decision, the Board ruled that it was "impossible or unreasonably difficult" for the union to reach the Babcock & Wilcox workforce at these particular premises by methods less intrusive than trespassing. To remove an "unreasonable impediment" to self-organization, the Board ordered that the union must have access to the factory parking lot and nearby walkways which were on private property. *Babcock and Wilcox Co.*, 109 N.L.R.B. at 493-94. The Court of Appeals denied enforcement of the Board's Order. *NLRB* v. *Babcock & Wilcox Co.*, 222 F.2d 316 (5th Cir. 1955).

The Supreme Court also rejected the Board's Order. *Babcock & Wilcox*, 351 U.S. at 112. The Court ruled that even reasonable, limited trespassing could not be mandated by the Board "if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message," and if the employer "did not discriminate against the union by allowing other distribution." *Id.* The Court concluded that an employer "must allow the union to approach his employees on his property" when "the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them." *Id.* at 113.

The Supreme Court has offered little basis to depart from the *Babcock & Wilcox* principle that trespassing will not be condoned except where truly necessary — where the "usual channels" of communication do not enable a union to "reach" the target workforce. *See id.* at 112. The Supreme Court cases since *Babcock & Wilcox*, though not squarely on point, have tended to bolster rather than diminish the vitality of the original *Babcock & Wilcox* holding.

In *Central Hardware Co.* v. *NLRB*, 407 U.S. 539 (1972), the Court held that *Babcock & Wilcox* principles would determine whether a hardware store could lawfully eject non-employee union organizers from its parking lot, rather than the broad First Amendment principles discussed in *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968). In *Logan Valley Plaza*, the Court had expanded the very limited principle that First Amendment criteria protected religious solicitation in a "company town", to apply First Amendment rights to peaceful picketing at a privately owned shopping mall. In *Central Hardware*, both the Board and the Court of Appeals applied only *Logan Valley Plaza* to find that union organizers could trespass on a retail store's parking lot. The Supreme Court vacated and instructed that on remand *Babcock & Wilcox*

principles should govern. The Court gave no indication of how *Babcock & Wilcox* would apply to the facts.

In *Hudgens* v. *NLRB*, 424 U.S. 507 (1976), the Court's opinion was largely devoted to overruling *Logan Valley Plaza*. Again, there had been considerable reliance upon *Logan Valley Plaza* in the proceedings below, and the Court vacated and remanded. The Court, however, did affirm the accommodation principles of *Babcock & Wilcox*. *Hudgens* involved economic strike activity by employees undertaken at the premises of someone other than their employer, which was not the case in *Babcock & Wilcox*. The Court stated that these facts "may or may not be relevant [to the Board] in striking the proper balance" between property rights and Section 7 rights. *Hudgens*, 424 U.S. at 522-23.

Finally, in *Sears, Roebuck & Co.* v. *San Diego County Council of Carpenters*, 436 U.S. 180 (1978), the Court upheld a ruling by the California Supreme Court that the Act did not preempt a state court injunction against a union's trespassory "area standards" picketing. To resolve the preemption issue, the Court examined whether the location of the picketing was arguably prohibited under Section 8 or arguably protected under Section 7 of the Act. The Court analyzed the case under *Babcock & Wilcox* in deciding that the picketing was not arguably protected, stating in *dicta*:

> [W]hile there are unquestionably examples of trespassory union activity [that might be protected under Section 7], experience under the Act teaches that such situations *are rare and that a trespass is far more likely to be unprotected than protected.*
>
> Experience with trespassory organizational solicitation by non-employees is instructive in this regard. While *Babcock* indicates that *an employer may not always bar non-employee union organizers from his property, his right to do so remains the general rule.* To gain access, the union has the burden of showing that *no* other reasonable means of communicating its organizational message to employees exists or that the employer's access rules discriminate against the union solicitation. *The burden . . . is a heavy one* . . . [and the balance] *has rarely been in favor of trespassory organizational activity.*

Sears, 436 U.S. at 205 (emphasis added).

Thus, the Court has remained true to the *Babcock & Wilcox* accommodation that allows trespassing only when the target workforce is inaccessible and cannot be reached by the ususal channels of non-trespassory communication. In *Central Hardware* and *Hudgens* the Court repeated the *Babcock & Wilcox* generality that neither property rights nor Section 7 rights are absolute, and that the Board has primary responsibility for accommodating conflicts between the two. *Central Hardware*, 407 U.S. at 544-45; *Hudgens*, 424 U.S. at 522; *see Babcock & Wilcox*, 351 U.S. at 112. The Supreme Court has never hinted, however, that the *Babcock & Wilcox* accommodation was too restrictive of Section 7 rights and ought to be changed. On the contrary, the *dicta* in *Sears* that legitimate trespassory organizational activity will be "rare" is the most natural application of *Babcock & Wilcox*.

Nonetheless, the Board has periodically attempted to expand *Babcock & Wilcox*. *See Lechmere, Inc.*, 914 F.2d at 329-30 (Torruella, J., dissenting), Appendix A at A-31-32. The latest attempt is *Jean Country*, 291 N.L.R.B. No. 4, 129 L.R.R.M. (BNA) 1201 (1988). As its basis in law for this new *Jean Country* accommodation, the Board relied chiefly upon the following language from *Hudgens* to justify an attempt effectively to circumvent *Babcock & Wilcox*: "The locus of that accommodation [between property rights and Section 7 rights] . . . may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context." *See Jean*

Country, 291 N.L.R.B. No. 4, slip op. at 4-5, 129 L.R.R.M. (BNA) at 1203 (citing *Hudgens*, 424 U.S. at 522).

After *Jean Country*, the Board now analyzes three shifting and unpredictable sets of facts to determine whether an employer can lawfully eject trespassing union agents: (1) the "strength" of the employer's property right; (2) the "strength" of the Section 7 rights exercised by the union[2]; and (3) the availability of reasonable alternative means for the union to achieve its intent. *See Jean Country*, 291 N.L.R.B. No. 4, slip op. at 9-10, 129 L.R.R.M. (BNA) at 1205.

Jean Country goes astray of *Babcock & Wilcox*. While *Babcock & Wilcox* instructed the Board to determine only whether union organizers can "reach" employees without trespassing, after *Jean Country* the Board now considers "the extent to which exclusive use of non-trespassory alternatives would *dilute the effectiveness* of the message." *Jean Country*, 291 N.L.R.B. No. 4, slip op. at 9, 129 L.R.R.M. (BNA) at 1205 (emphasis added). An analysis that turns on whether the message is diluted is not contemplated by *Babcock & Wilcox*. Rather, the Court was rightfully concerned that the "attempts" to communicate not be ineffective. *Babcock & Wilcox*, 351 U.S. at 112. The distinction between the effectiveness of the "attempts," which is what the *Babcock & Wilcox* Court said, and the effectiveness of the "message," which is what the *Jean Country* Board said, is crucial. The Court was not concerned with "how" the message was received, only "whether" it could have been received. The *Jean Country* approach impermissibly extends the *Babcock & Wilcox* inquiry to include an estimation of the recipient's willingness to listen.

The ALJ in *Lechmere, Inc.* recognized this distinction. He decided the case under *Fairmont Hotel*, 282 N.L.R.B. 139, 123 L.R.R.M. (BNA) 1257 (1986), and was not required to

[2] Organizational activity, for example, is a strong right, while area standards handbilling is among the weaker Section 7 rights.

evaluate the reasonableness of the available alternative means to communicate with Lechmere's workforce. The ALJ nonetheless concluded in *dicta* that there *were* adequate alternative means by which the Union could reach Lechmere employees. *Lechmere, Inc.*, 295 N.L.R.B. No. 15, slip op. at 10 (ALJ opinion), Appendix B at B-24. ALJ Biblowitz correctly noted that "[t]he fact that a large majority of the employees rejected [the Union's] solicitations does not detract from [the fact that reasonable alternative means were available]; *Fairmont* does not require that the Union be successful in its contacts with employees, only that there are reasonable alternative means of communicating with them." *Id.* at 9-10, Appendix B at B-24.

The Board then decided the case under *Jean Country*, which had been decided in the interim. The Board ignored the ALJ's conclusion that there were reasonable alternative means, relying on facts in the record such as the Union's inability to compile a list of employees, and the failure of employees to return authorization cards. *Id.* at 5, Appendix B at B-5. The Board implicitly rejected the ALJ's definition of effectiveness, and made the Union's success the primary indicator of whether the available non-trespassory means of communication were adequate and effective.

This erroneous approach was largely adopted by the First Circuit. The "badges of [in]effectiveness" cited by the First Circuit included "the union's inability to identify the vast majority of workers despite due diligence, the absence of meaningful opportunities for face-to-face contact, and the union's failed efforts to reach the employees." *Lechmere, Inc.*, 914 F.2d at 323, Appendix A at A-18-19. These "badges" reflect lack of employee response, not inability to "reach" employees. This goes far beyond *Babcock & Wilcox*.

In the present case, the facts showed that there were at least five methods or "means" by which the Union was able to "reach" Lechmere employees: (1) in person, through con-

versation over the short distance from public property to the area in which employees parked; (2) with signs, handbills, or posters, from the same location; (3) in person at home, by the simple process of tracing license plate registrations; (4) by telephone; and (5) through the large newspaper advertisements voluntarily employed by the Union.

In denying that these collectively were reasonable alternatives to trespass, the Board has lost sight even of its own rule. The Board in *Jean Country* was supposed to look to whether there were reasonably effective "means" of communication, and not whether the communication visited upon employees was effective. *Jean Country*, 291 N.L.R.B. No. 4, slip op. at 9, 129 L.R.R.M. (BNA) at 1205. When determining whether the means employed were effective, one may properly ask: "Could the employees hear what the union was saying?" or "Could they see their signs or leaflets?" One may not ask: "Did they seem to like what the union had to say?" or "How did they respond?"

II. By Following *Jean Country*, the Board and the First Circuit Have Betrayed the Court's Expectation That a Property Owner's Right to Exclude Trespassers is to be the General Rule.

Jean Country as applied is also circumventing *Babcock & Wilcox*. In the overwhelming majority of cases in which the Board has conducted a *Jean Country* accommodation analysis to determine whether a property owner has violated Section 8(a)(1) by denying access to union agents, the Board ruled that a violation had occurred.[3]

[3] *See, e.g., Sparks Nugget, Inc.*, 298 N.L.R.B. No. 69, 134 L.R.R.M. (BNA) 1121 (1990); *Little & Co.*, 296 N.L.R.B. No. 89, 132 L.R.R.M. (BNA) 1173 (1989); *Sentry Markets, Inc.*, 296 N.L.R.B. No. 5, 132 L.R.R.M. (BNA) 1001 (1989), enforced 914 F.2d 113 (7th Cir. 1990); *Mayer Group, Inc.*, 296 N.L.R.B. No. 9, 132 L.R.R.M. (BNA) 1005 (1989); *C.E. Wylie Const. Co.*, 295 N.L.R.B. No. 119, 132 L.R.R.M. (BNA) 1007 (1989); *Subbiondo and Assocs., Inc.*, 295 N.L.R.B. No. 132, 132 L.R.R.M. (BNA) 1006 (1989); *Granco, Inc.* 294 N.L.R.B. No. 7, 131 L.R.R.M. (BNA) 1325 (1989); *Trident Seafoods Corp.*, 293 N.L.R.B. No. 125, 131 L.R.R.M. (BNA) 1247 (1989); *Dolgin's, A Best Co.*, 293 N.L.R.B. No. 102, 131 L.R.R.M. (BNA) 1159 (1989); *Target Stores*, 292 N.L.R.B. No. 93, 130 L.R.R.M. (BNA) 1331 (1989); *Mountain Country Food Store, Inc.*, 292 N.L.R.B. No. 100, 130 L.R.R.M. (BNA) 1329 (1989); *Sahara Tahoe Corp.*, 292 N.L.R.B. No. 86, 131 L.R.R.M. (BNA) 1021 (1989); *W.S. Butterfield Theatres, Inc.*, 292 N.L.R.B. No. 8, 130 L.R.R.M. (BNA) 1113 (1989).

The thrust of *Babcock & Wilcox* unmistakably was to leave intact the usual private property rights, except where unusual circumstances required trespassing. The *Babcock & Wilcox* Court noted that the Act did not endow the NLRB with authority to "impose a servitude on the employer's property." *See Babcock & Wilcox*, 351 U.S. at 108. *Jean Country* fails to give the deference to property rights mandated by the Supreme Court, and substitutes instead a completely relative contest between rights of seemingly equal standing. *See Lechmere, Inc.*, 914 F.2d at 321, Appendix A at A-14 (describing the NLRB's latest attempt at accommodation as "[gathering] three interdependent bundles of facts . . . [tying] them together, and [weighing] them in the aggregate").

When the *Babcock & Wilcox* Court ordered the Board to accommodate these two rights, it did not mean that each right should be given equal weight. The only fair reading of *Babcock & Wilcox* is that the balance must be skewed in favor of private property rights. There can be no doubt after *Sears* that that was the intent. *Sears*, 436 U.S. at 205. By reversing that balance, the Board effectively imposes an easement in favor of union solicitation upon innumerable unsuspecting property owners, even those who (like Lechmere) have uniformly forbidden all solicitation. Infringement on private property rights is now the rule.

III. As in *Babcock & Wilcox*, in the Instant Case Deference to the Board is Not Appropriate.

Both Chief Justice Rehnquist and Judge Torruella have noted that the Board is entitled to some deference in assessing industrial reality, but when the Board "alters the balance of a framework carefully laid out by Congress and thoughtfully implemented by well-established Supreme Court doctrine," it is a judicial function to remedy the imbalance. *Lechmere, Inc.*, 914 F.2d at 326-27 (Torruella, J., dissenting), Appendix A at A-24 (citing *NLRB* v. *Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542, 1554 (1990) (Rehnquist, C.J., concurring)). The decision of the First Circuit is almost a perfect resurrection of the Board's position rejected by the Supreme Court in *Babcock & Wilcox*. *See Lechmere, Inc.*, 914 F.2d at 326-27 (Torruella, J., dissenting), Appendix A at A-24-25. The 1954 Board decision of *Babcock and Wilcox Co.* bears a surprising resemblance to the Board's 1989 treatment of *Lechmere, Inc.* Judge Torruella emphasized this similarity in his detailed discussion and chart comparing nine important factors. *Id.* at 327 (Torruella, J., dissenting), Appendix A at A-26. The Board's *deja vu* is troubling because the Supreme Court has spoken in the interim.

The Board is entitled to adapt labor policy to address the "changing patterns of industrial life." *See NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975). What has changed since 1956 to warrant revival of a discredited accommodation of rights? If anything, at present there is a more effective set of communication alternatives for union agents than there were in 1956. *See, e.g., Babcock and Wilcox Co.*, 109 N.L.R.B. at 491 (noting that in 1954 only 60% of the workforce at Babcock & Wilcox even had a telephone). Judge Torruella observed in his dissent that in 1990, politicians and advertisers regularly communicate and successfully persuade people by using methods that the Board has now deemed

ineffective for merely "reaching" people. *See Lechmere, Inc.*, 914 F.2d at 328 (Torruella, J., dissenting), Appendix A at A-28. In addition, if "changing patterns of industrial life" since 1956 have somehow influenced the Board to take its present course, what can be made of the Supreme Court's 1978 *dicta* that *"experience under the Act teaches that [protected instances of trespassory union activity] are rare and that a trespass is far more likely to be unprotected than protected"*, and an employer's right to bar non-employee union organizers from his property *"remains the general rule."* *Sears*, 436 U.S. at 205 (emphasis added).

Jean Country and *Lechmere, Inc.* are not natural extensions of *Babcock & Wilcox*, nor are they principled departures. Lechmere respectfully suggests that this important question merits review by the Supreme Court of the United States.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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DECEMBER 17, 1990

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 89-1683

LECHMERE, INC.
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER
OF THE NATIONAL LABOR RELATIONS BOARD

Before
TORRUELLA, *Circuit Judge*,
BOWNES, *Senior Circuit Judge*,
and SELYA, *Circuit Judge*.

Robert P. Joy, with whom *Keith H. McCown* and *Morgan, Brown & Joy*, were on brief for petitioner.

Richard A. Cohen, Attorney, with whom *Robert E. Allen*, Associate General Counsel, *Aileen A. Armstrong*, Deputy Associate General Counsel, and *Howard E. Perlstein*, Supervisory Attorney, were on brief for respondent.

September 17, 1990

SELYA, *Circuit Judge*. This matter is before us on an employer's petition to review an order of the National Labor Relations Board and a cross application for enforcement. The case raises significant questions concerning the balance which must be struck in the workplace between employers' private property rights and workers' rights of self-organization. We uphold and enforce the order of the Board.

I. STATEMENT OF THE CASE

A

The events giving rise to this litigation occurred in Newington, Connecticut. Newington is a suburb of Hartford. The relevant metropolitan area (Greater Hartford) includes at least three cities (Hartford, Newington, New Britain) and close to 900,000 people. The employer, Lechmere, Inc. (Lechmere), is a Massachusetts corporation which operates a chain of retail stores throughout New England. These emporia sell a wide range of "hard goods," including appliances, audio/video equipment, housewares, and sporting paraphernalia. In 1986, Lechmere opened a store in Newington, situated on a roughly rectangular parcel of land approximately 880 feet from north to south and 740 feet from east to west. The tract, commonly called the Lechmere Shopping Plaza, is bounded on the east by a major thoroughfare, the Berlin Turnpike, and on the north by Pascone Street.

Lechmere's store is the dominant structure on the site and stands at the south end of the rectangle. On the west side are 13 smaller shops owned by Newington Commercial Associates Limited Partnership (NewCom), an unrelated entity. Two public pay telephones are located in front of this shopping strip. In June 1987, only four satellite stores were open for business.

The Plaza's parking areas are in servitude to all of the mercantile establishments. There are no signs purporting to

restrict access to, or use of, the parking spaces; no stores have exclusive parking privileges; patrons or employees of any merchant may park anywhere. The primary parking lot (PPL) lies north of Lechmere's store and extends to Pascone Street. The satellite stores face the PPL. A smaller parking lot, more distant from the shopping strip, is situated to the east of Lechmere's store. Ownership of the real estate is divided between Lechmere and NewCom.

A grassy apron approximately 46 feet wide runs the entire length of the property along the Berlin Turnpike. The only breaks in that apron are for ingress to, and egress from, the shopping center. Most of that apron is public property. The remainder of the apron — the four foot strip furthest from the highway — is owned by Lechmere. At the main entrance, the grass continues in a westerly direction for approximately 50 feet on the north side only. Lechmere owns this patch. It also owns the land occupied by, and immediately surrounding, its store. NewCom owns the land occupied by, and immediately surrounding, the shopping strip. The remainder of the parcel, including most of the parking area, is owned jointly by Lechmere and NewCom.

There are three entrances to the property. The principal ingress is from the Berlin Turnpike, providing easy access to Lechmere's establishment and the strip stores. At this entrance, a directory-type sign identifies two of the stores in the shopping center as "Lechmere" and "Card Gallery." A second ingress route runs off Pascone Street, north of Lechmere's store and east of the shopping strip. This entrance faces the front of Lechmere's store and, like the main entrance, feeds into the PPL. Finally, there is a delivery entrance at the southernmost end of the property, running from the Berlin Turnpike to a loading dock behind Lechmere's building.

The public can enter the Lechmere store at one of two points. The principal doorway, facing north, is directly accessible from the PPL. The secondary door, on the store's east side, fronts a vehicular pick-up area. Lechmere employees

who drive to work are instructed to use this entrance. They are also asked to park in the easternmost portion of the PPL, that is, in the spaces closest to the Berlin Turnpike. On each set of doors to Lechmere's premises are 6" × 8" signs stating: "TO THE PUBLIC. No Solicitation, Canvassing, Distribution of Literature or Trespassing by Non-Employees in or on Premises."

Lechmere's no-solicitation policy is reduced to writing and has been in effect since 1982. It states:

> Solicitation of associates [*i.e.*, employees] in the work areas during working time is strictly prohibited. It is strictly prohibited in all selling and public areas at all times. Non-working time includes break periods, meal periods and other specified periods during the work day when associates are properly not engaged in performing their work tasks. Distribution of literature in work areas and public selling areas is prohibited.
>
> Non-associates are prohibited from soliciting and distributing literature at all times anywhere on Company property, including parking lots. Non-associates have no right of access to the non-working areas and only to the public and selling areas of the store in connection with its public use.

Historically, the no-solicitation policy has applied to the store and the parking lots. It has been strictly enforced. Various groups, including the American Automobile Association, the Salvation Army, and the Girl Scouts, have from time to time been prevented from soliciting on the premises.

B

In mid-1987, Lechmere had roughly 200 employees in Newington, all non-union. Beginning on June 16 of that year, Local 919 of the United Food and Commercial Workers (the

union) placed a series of five advertisements in the Hartford Courant, a daily newspaper, in an attempt to organize Lechmere's work force. The advertisements each contained a replica of a union authorization card captioned "mail today" or "mail it now." On one occasion, the ad consisted of a flyer distributed in conjunction with the newspaper. Given the Courant's limited penetration of the populous suburban area — it was delivered to fewer than 100,000 subscribers daily — and the fact that Lechmere systematically removed the ads from newspapers delivered to its Newington store, there is no particular reason to believe that many of the affected employees actually saw the ads.

On June 18, nonemployee union organizers started leafleting cars in the PPL, concentrating on the east side, thinking that a high percentage of these vehicles belonged to employees. Petitioner's assistant manager asked the organizers to leave and petitioner's security guards removed the pamphlets. A brochure which had been handed to an employee was confiscated by a guard. On two other occasions, handbilling sorties were aborted in a similar manner.

On the morning of June 20, union organizers, not part of Lechmere's work force, stood on the grassy apron, within a few feet of the Berlin Turnpike, in effect bracketing the main entrance. They attempted to distribute handbills to cars entering the PPL, assuming that, because of the early hour, the intended recipients were employees. A cadre of Lechmere officials responded; the general manager, various supervisors, and three security guards emerged from the store and confronted the union representatives. The manager told the organizers that they were on Lechmere's property and insisted that they leave. He threatened to call the police if they did not comply. Contending that they were on public land, the organizers refused to depart. Petitioner made good its threat.[1]

[1] The testimony of Lechmere's manager as to when he called the police contained inherent contradictions. As a result, the administrative law judge chose to credit the testimony of the union representatives over that of the manager. There is no valid basis for us to disturb reasonable credibility

On arrival, the police officers questioned the organizers, confirmed that they were on public property, and allowed them to continue their activities. At the same time, the police observed that the organizers were dangerously close to the highway and warned them against obstructing traffic flow. Because Lechmere's security guards were videotaping their movements, the union representatives departed.[2]

From August 7 through September 5, the union picketed Lechmere, regularly stationing personnel on the public portion of the grassy apron. During the next six months, intermittent picketing took place. The union also scanned the license plates of cars parked in the general area where employees had been told to park, and checked the information obtained with the Connecticut Department of Motor Vehicles. Notwithstanding these efforts, the union was only able to secure the names and addresses of 41 nonsupervisory Lechmere employees. Making what use it could of this information — nearly half of the 41 persons proved to have unlisted telephone numbers — the union tried to call or visit a good many of these workers. Several were high school students whose parents barred union organizers from talking to them. Four mailings to the contingent produced only one signed authorization card.

C

The union filed unfair labor practice (ULP) charges on July 21, 1987. After an evidentiary hearing before an administra-

judgments of this kind. *See, e.g., NLRB* v. *Horizon Air Servs., Inc.*, 761 F.2d 22, 27 (1st Cir. 1985) (discussing court's obligation to defer to the Board's credibility determinations); *Rikal, Inc.* v. *NLRB*, 721 F.2d 402, 406 (1st Cir. 1983) (similar).

[2] Although it was alleged that videotaping constituted illegal surveillance in violation of 29 U.S.C. § 158(a)(1), the Board dismissed this charge. No appeal has been taken from that aspect of the Board's decision and we do not address it here. Matters raised before the agency, but not briefed on appeal, are waived. *See, e.g., Consumers Union* v. *FPC*, 510 F.2d 656, 662 & nn.9, 10 (D.C. Cir. 1974); *see also Marin Piazza* v. *Aponte Rogue*, 909 F.2d 35, — (1st Cir. 1990) (discussing preclusive effect of Fed. R. App. P. 28(a) in analogous circumstances).

tive law judge (ALJ), it was concluded that Lechmere violated Section 8(a)(1) of the National Labor Relations Act (the Act), 29 U.S.C. § 158(a)(1), in two ways: (1) by refusing to allow representatives of Local 919 to engage in organizational activity on company property, and (2) by attempting to remove union representatives from a public area adjacent to company property. Following the Board's issuance of a suitable remedial order (the terms of which are not challenged), the present proceeding materialized.[3]

II. THE BOARD'S ROLE

It is undisputed that "the N.L.R.B. has the primary responsibility for developing and applying national labor policy." *NLRB* v. *Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542, 1549 (1990). Given the Board's "special competence" in the field of labor relations, *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975), and its vital role in administering the Act, we accord considerable deference to its views. *See Curtin Matheson*, 110 S. Ct. at 1549. This deference extends to the Board's factual determinations, so long as they are supported by substantial evidence on the record as a whole. *See Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 488 (1951); *NLRB* v. *Horizon Air Servs., Inc.*, 761 F.2d 22, 25 (1st Cir. 1985); *see also* 29 U.S.C. § 160e).

The Board's application of law to fact is reviewed under substantially the same standard. *See NLRB* v. *United Ins. Co.*, 390 U.S. 254, 260 (1968). Thus, the Board's resolution of a mixed question of fact and law is worthy of deference and must be honored so long as the resolution is factually reasonable, that is, founded upon substantial evidence, and legally sound. *See NLRB* v. *Hearst Publications*, 322 U.S. 111,

[3] The Board adopted the ALJ's factual findings, including credibility determinations. Accordingly, we henceforth refer to the ALJ's findings as the Board's. *See Local Union No. 25, Teamsters* v. *NLRB*, 831 F.2d 1149, 1151 n.1 (1st Cir. 1987); *NLRB* v. *Horizon Air Servs., Inc.*, 761 F.2d 22, 24 n.1 (1st Cir. 1985). In our view, the ALJ's factual findings are fully consonant with 29 U.S.C. §§ 160(e), (f).

130-31 (1944); *Boston Univ. Chapter, AAUP* v. *NLRB*, 835 F.2d 399, 401 (1st Cir. 1987). As to inferential and deductive constructs which the Board employs to assist it in answering mixed fact/law questions, courts should uphold the Board's approach as long as it is rational and consistent with the Act. *See Curtin Matheson*, 110 S. Ct. at 1549; *Destileria Serrales, Inc.* v. *NLRB*, 882 F.2d 19, 21-22 (1st Cir. 1989); *Penntech Papers, Inc.* v. *NLRB*, 706 F.2d 18, 22-23 (1st Cir.), *cert. denied*, 464 U.S. 892 (1983). Because it is the Board which, over time, must adapt the Act to the changes that suffuse industrial life, the Board's chosen decisional model is entitled to judicial respect even if it represents a departure from prior policy. *Curtin Matheson*, 110 S. Ct. at 1549. Put another way: "To hold that the Board's earlier decisions froze the development of [an] important aspect of the national labor law would misconceive the nature of administrative decision making." *J. Weingarten*, 420 U.S. at 265-66.

While the standard of review is unarguably deferential — so long as the Board's conclusion derives plausibly from the record, we may not reverse it simply because we, unencumbered, would have reached a different result — deference does not imply that courts should rubber-stamp the Board's decisions. *See id.* at 266. Matters of law are, of course, subject to plenary review. *See, e.g., United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 194 n.9 (1963). Furthermore, a reviewing court is obliged to set aside the Board's findings of fact, notwithstanding the deference due, when the evidence, "tak[ing] into account whatever in the record fairly detracts" from the proof on which the Board relies, it is not adequate to sustain the conclusion drawn. *Universal Camera*, 340 U.S. at 488. Evidence which is vague or entropic cannot be palmed off as "substantial" under the guise of respect for the agency's determinations. The key is the reasonableness of the Board's findings, judged in light of the entire record. *See, e.g., Penntech*, 706 F.2d at 23; *Soule Glass and Glazing Co.* v. *NLRB*, 652 F.2d 1055, 1073 (1st Cir. 1981).

III. THE FIRST UNFAIR LABOR PRACTICE

A

Section 7 of the Act, 29 U.S.C. § 157, guarantees employees the right to self-organization.[4] Section 8(a)(1), 29 U.S.C. § 158(a)(1), prohibits employers from "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of [Section 7] rights." Experience teaches that "[t]he right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others." *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956). Such "others" are, typically, unions and union organizers. Although the Section 7 right is the workers' right, not the union's right, unions and their agents, derivatively, enjoy the protection of Section 7. *See Sears, Roebuck & Co.* v. *San Diego Dist. Council of Carpenters*, 436 U.S. 180, 206 n.42 (1978); *Central Hardware Co.* v. *NLRB*, 407 U.S. 539, 542 (1972); *Emery Realty, Inc.* v. *NLRB*, 863 F.2d 1259, 1264 (6th Cir. 1988); *see also Thomas* v. *Collins*, 323 U.S. 516, 533-34 (1945) (addressing the "necessarily correlative . . . right of the union, its members and officials . . . to discuss with and inform . . . employees concerning" choices anent unionization).

The prerogatives conferred by Section 7 are important, but not absolute. If an effort to further Section 7 rights conflicts with other, equally solemn rights, the law demands a reasonable accommodation. One situation which frequently sets competing rights on a collision course occurs when a union's game plan for mounting an organizational campaign involves trespass, thus encroaching on an employers' property rights. In such straitened circumstances, the adjudicatory task

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[4] Section 7 provides in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

29 U.S.C § 157.

is to strike an equitable balance "between employees' § 7 rights and employer's property rights ... 'with as little destruction of one as is consistent with the maintenance of the other'." *Hudgens* v. *NLRB*, 424 U.S. 507, 521 (1976) (quoting *Babcock*, 351 U.S. at 112). The task is often more easily stated than achieved.

B

The seminal case in this murky corner of the law is *Babcock*. There, a manufacturing concern owned and operated a fenced 500-employee plant on a 100-acre tract in a predominantly rural area near a community of approximately 21,000 people. About 40% of the employees dwelt in the nearby town, while the rest lived within a 30-mile radius. The plant's parking lot could be reached only by a 100-yard-long driveway, entirely on the employer's property. A 31-foot public right-of-way extended from the highway and intersected the driveway at one point. This junction was the only public place in the immediate vicinity of the plant at which leaflets could be distributed to employees, but safety considerations made any such distribution "practically impossible." 351 U.S. at 107. The union used the mails to communicate with over 100 employees, visited some homes, and talked to some employees by telephone. Dissatisfied with the results, union organizers, none of whom were employees, tried handbilling in the parking lot. The company had, and enforced, a comprehensive no-solicitation policy prohibiting such activity by nonemployees on company grounds. Applying this policy, it banned the organizers.

The Board ruled that Section 8(a)(1) had been infracted. The court of appeals disagreed, 222 F.2d 316 (5th Cir. 1955), as did the High Court. Justice Reed wrote that nonemployee union organizers did not enjoy the same status as employees of their invitees and could be excluded from the employer's private property if "reasonable efforts by the union through

other avaliable channels of communication w[ould have] enable[d] it to reach" the work force with its message. 351 U.S. at 112. Since several alternative means of employee contact were available — alternatives which would likely be effective since a large proportion of the employees were easily accessible outside of working hours, *id.* at 113 — the employer's right to exclude nonemployees from its property need not yield to permit the dissemination of organizational information by trespassory means. *Id.* at 112-13. Put another way, the company could deny nonemployees the right to distribute union literature in the plant parking lot because the employees, though deprived of the benefits of handbilling, were not "beyond the reach of reasonable union efforts to communicate with them". *Id.* at 113.

In *Hudgens*, the Court reaffirmed that the extent of the necessary accommodation rested largely "on the nature and strength of the respective § 7 rights and private property rights asserted in any given context"; and that allowing trespassory access to private property, or not, depends upon a reasoned assessment and weighing of the interests involved and the availability of alternative means of communication. 424 U.S. at 522.

In *Sears*, the Court held that a state court could entertain an employer's state-law trespass claims against union representatives engaged in area standards picketing. 436 U.S. at 207-08. In discussing whether the state-law claims were preempted, the Court explained that, unlike organizational picketing, "[a]rea-standards picketing ... has no ... vital link to the employees located on the employer's property." *Id.* at 206 n.42. Thus, "[E]ven ... [if] ... picketing to enforce area standards is entitled to the same deference in the *Babcock* accommodation analysis as organizational solicitation, it would be unprotected in most instances." *Id.* at 206 (footnote omitted). *Sears*, then, highlighted the strength of the Section 7 right as a critical factor in the equation. While the right

asserted in *Sears*, itself — area standards picketing at a remote locus — was relatively weak, the *Sears* Court was careful to note, in dicta, that the right to organize without employer interference is a heartier Section 7 right, lying at "the very core" of the Act. *Id.* at 206 n.42.[5]

C

Over the years, the Board has made several efforts to formulate a workable standard around the dictates of *Babcock* and its progeny. Its most recent attempt is contained in *Jean Country*, 291 N.L.R.B. No. 4 (Sept. 27, 1988). Petitioner argues that the balancing test articulated in *Jean Country*, applied here by the Board to petitioner's detriment, does violence both to *Babcock* and to the Act. In addressing Lechmere's argument, we must determine whether the Board's elaboration in *Jean Country* constitutes a reasonable construction of the Act in light of the "changing patterns of industrial life," *J. Weingarten*, 420 U.S. at 266; and if so, whether the Board's calibration of competing rights in this case passes the substantial evidence test.

In *Jean Country*, the Board observed initially that "there is a 'spectrum' of Section 7 rights and private property rights and . . . the place of a particular right in that spectrum might affect the outcome of a [given] case." *Jean Country*, *supra*, at 8. That is familiar lore. *See Hudgens*, 424 U.S. at 522; *Babcock*,

[5] To be sure, the Court also noted, again in dicta, that union assertions of the right to tresspass for organizational purposes have "generally been denied except in cases involving unique obstacles to nontrespassory methods of communication with the employees." *Sears*, 436 U.S. at 205-06 n.41. Lechmere interprets this statement to mean that a heavy presumption exists in favor of property rights over Section 7 rights. We do not agree. Rather, we believe the Court meant merely to reinforce the idea that the burden of proving a lack of reasonable alternative means of communication rests with the trespasser. Absent a showing, based upon objective criteria, that much means are futile or likely not to exist, a union's asssertion of access rights will probably be denied.

351 U.S. at 112. The Board indicated that, in developing shadings along the spectrum, it will typically not be enough merely to collect information defining the nature and strength of the competing rights in a particular situation. A third bundle of information will also be needed, pertaining to the "availability of reasonably effective alternative means" of communication. *Jean Country*, *supra*, at 9. The Board characterized its "essential concern" as "the degree of impairment of the Section 7 right if access should be denied, as it balances against the degree of impairment of the private property right if access should be granted," factoring in "the availablity of reasonably effective means." *Id.*

The Board forecast that, "in cases when a property owner has especially compelling reasons for barring access and when the Section 7 right is less central than, for example, the right of employees to organize . . . we may more readily find that means of communication other than those entailing entry onto the property in question constitute a reasonable alternative." *Id.* at 8. Conversely, if a particular property right is diluted, as "when property is open to the general public" and some "more private character has [not] been maintained," it becomes more likely that other alternatives will be found unsatisfactory and a denial of access found unlawful. *Id.* at 10. The Board wisely disclaimed any mechanical formula, *id.* at 9-10, offering instead a compendium of factors which might prove relevant in assessing the contents of the various informational bundles.[6]

[6] These included: (1) as to the employer's property right, the nature of the interest, the use to which the property is put, any restrictions that are imposed on public access to it, and the property's relative size and openness, *Jean Country*, *supra*, at 8; (2) as to the employees' Section 7 right, the nature of the right, the identity of the employer to whom the right is directly related, the relationship of the employer to the property, the identity of the audience to which the communication concerning the Section 7 right is directed, and the manner in which the activity related to that right is carried out, *id.*; and (3) as to alternative means, the safety of attempting communications at alternative sites or in other ways, the desirability of avoiding enmeshment of neutrals, and the extent to which use of communication alternatives, to the exclusion of trespassory conduct, would dilute the effectiveness of the union's message, *id.* at 8-9.

This elaboration constitutes a plain recognition by the Board that it must gather the three interdependent bundles of facts just described — strength of employees' Section 7 right, strength of employer's property right, availability and efficacy of alternative means of communication — tie them together, and weigh them in the aggregate. We find this approach to the accommodation of competing interests with *Babcock* and in tune with the Act. In our judgment, *Jean Country* states a permissible view of the law and affords a useful analytic model for resolution of access-to-property cases. We are reinforced in our assessmant by the District of Columbia Circuit's recent holding that "[t]he elaboration . . . advanced in *Jean Country* . . . sensibly construes the Act in light of High Court precedent in point." *Laborers' Local Union No. 204* v. *NLRB*, 904 F.2d 715, 718 (D.C. Cir. 1990); *see also Emery Realty*, 863 F.2d at 1264 (citing *Jean Country* with approval). Since *Jean Country* is a "reasonable interpretation of the Act," *NLRB* v. *City Disposal Systems*, 465 U.S. 822, 841 (1984), melding harmoniously with binding precedent, we accept the Board's reliance on it.[7]

D

Lechmere contends that, even if *Jean Country* comprises a reliable explication of the law, the Board incorrectly applied it in this case. As a corollary matter, Lechmere also contends that the Board's findings fail the substantial evidence test.

We look to the record and to the Board's analysis. It is beyond serious question that the Section 7 interest of the company's employees in receiving organizational information from

[7] The dissent argues that *Jean Country* is entitled to less than the usual deference because it represents a change in policy. As we have previously recognized, however, an agency is not shackled by its prior precedents if it explicitly acknowledges that it is departing and offers a principled rationale for its departure. *See Shaw's Supermarkets, Inc.* v. *NLRB*, 884 F.2d 34, 36 (1st Cir. 1989). In the present case, we think the Board has adequately fulfilled our criteria.

the union was robust, implicating what the *Sears* Court, 436 U.S. at 206 n.42, called a "core" Section 7 right. Lechmere's property right was not quite as strong. On the one hand, petitioner was a co-owner of the parking lot, used it for business purposes, and followed a stringent no-solicitation policy. On the other hand, petitioner's property interest was diluted by the public nature of the parking lot and the nonexclusivity of its use. Moreover, the Board found, and the record abundantly supports, that the planned organizational activity did not interfere with normal use of the PPL, disrupt Lechmere's business, constitute harassment, or impede traffic flow.[8] All in all, we cannot fault the Board's determination that the property right here at issue, though "relatively substantial," did not serve to "diminish the strength of the core Section 7 right asserted."

The Board also found that, unless effective alternative means of communicating the organizational message existed, the Union's Section 7 right would be so "severely impaired" as to be "substantially destroyed." Such a premise is consistent with the Court's statement that "when the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize." *Babcock*, 351 U.S. at 112. Thus, when the Section 7 interest is powerful, the *Babcock* accommodation anchors the necessity of trespass rather firmly to

[8] We have reviewed the employer's proffer of evidence that union representatives occasionally entered the store itself. We believe that the Board, in its discretion, reasonably rejected the proffer on relevancy grounds. The only issue presented in this case was whether the company lawfully denied the union access to the parking areas for handbilling purposes. The Board's order does not in any way foreclose petitioner from continuing to bar distribution of leaflets by nonemployees within the store proper.

the unavailability of other reasonably efficacious means of communicating with the desired audience.[9]

This brings us to the crux of the dispute: whether the union had open to it other effective means of reaching Lechmere's work force with its organizational message. The devoir of persuasion rested with the union. *See Sears*, 436 U.S. at 205; *Jean Country*, *supra*, at 7. The Board determined that the burden had meen met: "there [were] no reasonable, effective alternative means available for the Union to communicate its message to the [company's] employees." Petitioner's current assault requires that we probe the multifaceted calculus of alternative means in order to explain why we do not regard this determination as undeserving of deference.

Of course, there is no surefire litmus test which can reveal, unfailingly, whether available communicative means are reasonably effective alternatives to trespassory handbilling in a given situation. Be that as it may, the lowest common denominator of the alternative means calculus necessarily reduces to objective reasonableness. *See Jean Country*, *supra*, at 7 (showing of ineffectiveness must be "based on objective considerations, rather than subjective impressions"). Reasonableness expands and contracts: the rights at issue, and the particular circumstances, color its definition whenever alternative means are examined. After all, the Court made clear in *Hudgens* that both Section 7 rights and property rights exist along a continuum. 424 U.S. at 522. The strength and nature of these rights will "inform the analysis of whether a union has reasonable alternative means to reach the targets of its section 7 activity." *Laborers' Local*, 904 F.2d at 718. Thus, the expansiveness of "reasonable alternative means" will vary inversely with the strength and nature of the Section 7 right asserted

[9] The anchor may be dropped differently in cases where the employer's access rules single out, and discriminate against, union activity. *See, e.g., Sears*, 436 U.S. at 205. Here, however, we are not dealing with discriminatory access rules. Lechmere's no-solicitation policy was enforced impartially.

and will vary directly with the strength and nature of the private property right asserted. Because reasonableness is a concept, not a constant, *cf. Sierra Club* v. *Secretary of the Army*, 820 F.2d 513, 517 (1st Cir. 1987) (reasonableness is a "mutable cloud, which is always and never the same") (paraphrasing Emerson), determinations of reasonableness are, in this environment, *sui generis*.

These principles are especially important in distinguishing *Babcock* from the case at hand. Although the strength of the Section 7 right in the two cases seems equal — indeed, the right at issue is substantially identical — the property right asserted in *Babcock* was significantly stronger than that asserted here. In *Babcock* itself, the factory was the only building on a large, secluded tract; as a manufacturing facility, it was not open to the public or any other regular influx of invitees; the surrounding area was rural; the employees, while inaccessible at work, were relatively accessible to union organizers off hours, since virtually all the employees lived within 30 miles of the plant and there was only one community of any size in the vicinity; and more than 90% of the employees drove to work in private automobiles and parked in a private company lot, using a driveway which only served the employer's premises. Significantly, there was no allegation that the union did not know, or would have difficulty absent trespassory solicitation in ascertaining, the workers' identities. These circumstances required a finding that the employees were "in reasonable reach" by methods short of trespassory handbilling. *Babcock*, 351 U.S. at 113. In a small-town setting, readily identifiable workers were open to other reasonable alternatives such as "us[ing] personal contacts on streets or at home, telephones, letters or advertised meetings to get in touch with the employees." *Id.* at 111.

The situation at bar presents some meaningful differences. Unlike in *Babcock*, the Board found that Lechmere's employees are not easily accessible or identifiable. Unlike in *Babcock*, Lechmere's work force is drawn from a much more

populous area and reports to work at a place where it is difficult to discern the targeted audience from the multitude of shoppers and persons working for other businesses within the Plaza.

The Board's other findings also tend to distinguish the instant case from *Babcock*. Here, the union had made a good-faith effort to explore alternative routes.[10] Although it expended considerable time and effort, the union was able to compile merely a skeletal employee roster. It had tried, and abandoned, deploying handbillers on public property — a practice which the Board found unsafe and ineffectual.[11] No other plausible method of personal contact with the majority of the work force had been suggested. The mail — a method which, by itself, has been said not to constitute an effective alternative to personal contact, *see, e.g., National Maritime Union* v. *NLRB*, 867 F.2d 767, 773 (2d Cir. 1989); *NLRB* v. *Tamiment, Inc.*, 451 F.2d 794, 798 (3d Cir. 1971), *cert. denied*, 409 U.S. 1012 (1972) — was impracticable in this case because of the incomplete list of names and addresses. The union had tried newspaper advertising, without notable success, and the Board judged such advertising to be inutile.

The badges of effectiveness must be applied in a practical, common-sense way. Here, the location of the store as part of a shopping mall, the employer's unwillingness to disclose the names and addresses of workers, the workers' scattered domiciles throughout a populous metropolitan area, the union's inability to identify the vast majority of workers despite due diligence, the absence of meaningful opportunities

[10] We reject petitioner's intimation that the union must actually exhaust every conceivable means, proving it to be in fact ineffective. A good-faith effort is all that should be required. *See Emery Realty*, 863 F.2d at 1265; *Husky Oil, N.P.R. Operations, Inc.* v. *NLRB*, 669 F.2d 643, 645 (10th Cir. 1982).

[11] The only available strip of public property, the edge of the grassy apron, abuts the Berlin Turnpike, a four-lane highway with a speed limit of 50 m.p.h. The area is commercial in character and there are indications in the record that traffic is more than minimal. There is no traffic signal or stop sign at the entrance from the turnpike into the Plaza.

for face-to-face contact, and the union's failed efforts to reach the employees, all argue convincingly in favor of the Board's determination. Moreover, we think that in this instance three factors weigh heavily in the balance: (1) the lack of other feasible ways of reaching workers in person, (2) the prohibitive cost of certain other suggested alternatives, and (3) the minimally intrusive nature of the putative trespass. We comment briefly on each of these aspects.

First, we recognize that personal contact is an important part of any organizing effort. Whether to opt for a union, or not, is rarely a cut-and-dried proposition; there are pros and cons, the evaluation of which may be better suited to the dynamics of lively discourse than to the static impersonality of more remote approaches. Non-unionized workers are often fearful of management's reactions to the proposed introduction of a union, and personal contact is extremely useful in overcoming such timorousness. Here, the union had no other feasible way of effecting personal contact with the majority of the workers. We do not suggest that trespassory handbilling must be allowed whenever personal contact is otherwise unavailable — but we believe, nevertheless, that the absence of other opportunities for personal contact will, in the usual case, cut sharply in favor of the union. Put another way, the easier the union's access to the workers, the more that non-trespassory means of communication will suffice.[12]

[12] Accessibility, in this context, is dichotomous. One aspect implicates the geography of the workplace. *Cf., e.g., Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793, 799 (1945) (recognizing need for access to remote "mining or lumber camp where the employees pass their rest as well as their work time"); *Husky Oil, N.P.R. Operations, Inc.* v. *NLRB*, 669 F.2d 643, 646-47 (10th Cir. 1982) (cataloging cases). The second aspect of accessibility implicates the identifiability of the work force: if the union does not know, and cannot readily learn, the names and addresses of the employees, alternative means will in many cases shrink dramatically in effectiveness. *Cf., e.g., NLRB* v. *Sioux City and New Orleans Barge Lines, Inc.*, 472 F.2d at 753, 754 (8th Cir. 1973) (denying trespassory entry where, *inter alia*, the employer "supplied the union with the names and addresses of crew members and the dates and places on which each would board or leave the boats");

Second, we think it is unrealistic to divorce considerations of cost from the calculus of alternative means. In theory, a union could always buy enough television time to saturate a market and thus convey its organizational message to the affected employees. Yet in the ordinary case, it would be wildly unreasonable to expect the union to embrace this extreme. Television advertising is expensive and, when addressed to a work force which comprises a tiny fraction of the viewing audience, extravagantly wasteful. Much the same can be said for many radio and newspaper advertisements. *See, e.g., NLRB* v. *S & H Grossinger's, Inc.*, 372 F.2d 26, 29 (2d Cir. 1967) (radio and newspaper advertising alone are not reasonable alternatives because they are expensive and relatively ineffectual). To be genuine alternatives, communicative means must be cost-effective to some degree.[13]

Petitioner makes much of the Court's observation that, in *Babcock*, "[t]he various instruments of publicity" were available to the union. *Babcock*, 351 U.S. at 113. We do not read this single statement as meaning that the existence — whatever the cost — of mass media outlets necessarily trumps the employees' Section 7 right of self-organization. *Accord National Maritime Union* v. *NLRB*, 867 F.2d 767, 773 (2d Cir. 1989) (pointing out that "the Court did not state that these methods, without more, provided an adequate means of communication"). In a case like *Babcock*, where the work force was clustered in and around a small town, it may well be that "instruments of publicity," say, posters at the grange hall

NLRB v. *Solo Cup Co.*, 422 F.2d 1149, 1151 (7th Cir. 1970) (denying trespassory entry because, *inter alia*, the work force was "readily identifiable").

[13] In *Jean Country*, the Board "note[d] . . . generally, [that] it will be the exceptional case where the use of newspapers, radio, and television will be feasible alternatives to direct contact." *Jean Country*, *supra*, at 7. The dissent says that the Board thus wove an impermissible "rule" out of "balance-tipping dogma." We think this criticism misreads the quoted statement — a statement which we see as no more than a prediction of probable outcomes in an increasingly urbanized society where use of the mass media has become more and more expensive.

or an inexpensive ad in a weekly newspaper, comprise reasonable alternatives. That is much less likely to be true, however, when the work force is scattered throughout a metropolitan area like Greater Hartford.

The third special factor in this case does not directly implicate the alternative means calculus, but bears upon it in practical terms. We agree with other courts that in a trespassory solicitation case the extent of the union's intrusion affects whether the property right should prevail. *See, e.g., Laborers' Local*, 904 F.2d at 718 (property interest not compelling where handbilling carried out unobtrusively in parking lots which were, generally, treated as public property); *Emery Realty*, 863 F.2d at 1264 (property interest in arcade portion of shopping mall weakened by being open to public for shopping and as a route for pedestrian travel). Permitting non-disruptive or minimally disruptive trespass constitutes a much gentler accommodation than insisting that a property right yield to organizational activity which threatenens the normal operations of the owner's business. *See, e.g., NLRB* v. *Sioux City and New Orleans Barge Lines, Inc.*, 472 F.2d 753, 756 (8th Cir. 1973) (denying trespassory access where work force otherwise identifiable and access to property would substantially interfere with production). In other words, trespassory handbilling in such a situation balances the competing rights "with as little destruction of one as is consistent with the maintenance of the other." *Babcock*, 351 U.S. at 112.

In sum, we believe that the Board's findings, its conclusion that no other reasonably effective means of communication were open to the union, and its endorsement of Local 919's handbilling, were supportable. To be sure, the question is close — but its very closeness argues in favor of staying the judicial hand. The Court, after all, has no doubt of the Board's pivotal role in performing the necessary assessment, observing that "the locus of [the] accommodation . . . may fall at differing points along the spectrum . . . [and] the primary respon-

sibility for making this accommodation must rest with the Board in the first instance." *Hudgens*, 424 U.S. at 522. In this case, the Board had a rational basis to conclude that, absent trespassory handbilling, the employees were "beyond the reach of reasonable union efforts to communicate with them." *Babcock*, 351 U.S. at 113. Its analysis is sufficiently record-rooted to withstand appellate scrutiny under the deferential standard which we must apply. Accordingly, the holding that Lechmere violated Section 8(a)(1) by barring union representatives from organizational activity in the shopping center's parking lot is free from legal infirmity.

IV. THE SECOND UNFAIR LABOR PRACTICE

The second ULP focuses upon the union's attempt to use public property — the portion of the grass apron nearest the highway — as a base for distributing leaflets to motorists entering the PPL. The overarching legal principle is staunch: an employer cannot interfere with protected union activities that occur away from its premises. *See, e.g., NLRB* v. *Central Power & Light Co.*, 425 F.2d 1318, 1323 (5th Cir. 1970); *Montgomery Ward & Co.* v. *NLRB*, 339 F.2d 889, 894 (6th Cir. 1965); *cf. Hughes Properties, Inc.* v. *NLRB*, 758 F.2d 1320, 1322 (9th Cir. 1985) (discussing solicitation in cafeteria on employer's property during non-working hours). In general, therefore, an employer violates Section 8(a)(1) by trying to silence nonemployee union organizers in their efforts to communicate with employees from public property adjacent to the workplace.

Here, the Board found, supportably, that the store manager told "the [u]nion representative[s] to leave [while] they were on public property, where they had a right to be." The manager conceded as much on cross-examination. The evidence showed that, after summoning the police, the manager insisted, wrongly, that the union organizers were

trespassing. In these circumstances, and mindful of the Board's latitude in judging credibility, *see supra* note 1, the record amply supports the conclusion that Lechmere endeavored to have the police oust union representatives from the public portion of the grassy apron on the date in question, thus violating Section 8(a)(1).

In addition to challenging the Board's finding on this point, the company also attempts to confess and avoid. It argues that, even if the June 20 incident occurred as stated, it was too isolated and inconsequential to bear the weight of a ULP charge. We do not agree. Although the Board, and the federal appellate courts, have recognized that a *de minimis* principle may have some small place in unfair labor practice proceedings, *see, e.g., NLRB* v. *Grunwald-Marx, Inc.*, 290 F.2d 210, 210 (9th Cir. 1961) (per curiam), we think such a doctrine is inapposite here. Any course of conduct, no matter how enduring or persuasive, can be broken down into tiny particles and made to seem relatively benign. But, events must be judged in context. So viewed, what transpired on June 20 cannot fairly be characterized as a single, isolated, innocuous instance of anti-union animus. Rather, it was part of an ongoing struggle between union and management, each jockeying for position as Local 919 sought to organize Lechmere's employees. As such, the Board was well within its domain in concluding that the employer's conduct, seen in the light of the record as a whole, was not within the narrow *de minimis* exception.

V. CONCLUSION

We need go no further. For the reasons mentioned, we are persuaded that the Board's findings rest upon substantial evidence and are untainted by any cognizable error of law. Lechmere's petition for review is denied and dismissed, the NLRB's cross application is granted, and its order is

Enforced.

TORRUELLA, *Circuit Judge* (Dissenting). Paraphrasing Chief Judge Rehnquist's concurring opinion in *NLRB* v. *Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542, 1554 (1990), "[t]he Board's . . . rule [in this case] seems to me to press [past] the limit the deference to which the Board is entitled in assessing industrial reality . . . ." This is an important case because it alters the balance of a framework carefully laid out by Congress and thoughtfully implemented by well-established Supreme Court doctrine. The issue presented here is not a new one although the standard applied by the Board in determining the commission of an unfair labor practice by Lechmere is of recent formulation. *See Jean Country*, 291 N.L.R.B. No. 4 (1988). In *Jean Country*, the Board reframed the balancing test required by the Supreme Court in the case of *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956). To my view, it did so in a manner that attempts to circumvent the quintessential elements of that seminal decision.

In *Babcock & Wilcox*, as in the present case, the employer refused to permit distribution of union literature by non-employee union organizers on a company-owned parking lot. The Board found "that it was unreasonably difficult for the union organizer[s] to *reach* the employees off company property," *Babcock & Wilcox*, 351 U.S. at 106 (emphasis added), and held that the refusal of access to the parking lot impeded the employees' right to self-organization in violation of § 8(a)(1) of the Act. The employer in *Babcock & Wilcox* was engaged in manufacturing, and its plant was located on a 100 acre tract about one mile from a community of about 21,000 people, in which lived about 40% of its 500 employees, the rest living within a 30 mile radius. The parking lot could be reached from a driveway which was entirely company property, except for a 31 foot public right-of-way extending from the highway. This strip was the only public place in the immediate vicinity of the plant at which leaflets could be distributed to employees. The Board found that, because of

traffic conditions at that place, it was "practically impossible for union organizers to distribute safely to employees in motors [sic] as they enter[ed] or [left] the lot." *Id.* at 107. The union had used the mails to communicate with over 100 employees, and had also visited homes and talked to employees on the telephone. The company had a non-discriminatory no-solicitation policy prohibiting such actions by non-employees on company grounds.

On these facts, the Court reversed the Board's conclusion that a violation of § 8(a)(1) had taken place. It ruled that the Board erroneously applied cases involving "employees isolated from normal contacts," *e.g.*, "personal contacts on streets or at home, telephones, letters or advertised meetings." *Id.* at 111. The Court ruled:

> It is our judgment . . . that an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other *available channels of communication* will enable it to *reach* the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution . . .
>
> . . . [I]f the location of a plant and the living quarters of the employees place the employees beyond the *reach* of reasonable union efforts to communicate with them, the employer must allow the union to approach his employees on his property. No such conditions are shown in these records.
>
> The plants are close to small well-settled communities where a large percentage of the employees live. *The usual methods of imparting information are available. The various instruments of publicity are at hand.* Though the quarters of the employees are scattered they are in reasonable *reach* . . . .

Id. at 112-13 (citations omitted, emphasis added).

Try as I may, I fail to see any significant factual or legal distinction between those presented in *Babcock & Wilcox* and those in this appeal. A factual comparison is illustrative:

		Babcock & Wilcox	**Lechmere**
(1)	Nature of business	Manufacturing plant	Retail store in shopping center
(2)	Description of private property in question	Plant located in 100 acre tract, with parking lot 100 yards away from public highway	Store located in 13.5 acres with parking lot immediately adjacent to public highway
(3)	Number of employees	500	200
(4)	Number of employees contacted by Union through various means	100	41
(5)	Percentage of employees contacted by the Union	20%	20.4%
(6)	Means of communication available	Personal contact in streets and homes, mailings, telephone calls	Some personal contact at homes and through handbillings, mailings, telephone calls to homes, pickets at public entrance, newspaper advertisements
(7)	Community characteristics	40% of employees live in town of 21,000, the rest in radius of 30 miles	89% of employees live in three "urban-suburban areas" (pop. 900,000) with a maximum distance of 15 miles between them
(8)	Board's findings regarding organizational activity on public highway adjacent to private property	"practically impossible for union organizers to distribute safely"	"ineffective and unsafe"
(9)	No-solicitation rule	Uniformly applied	Uniformly applied

The only materially different fact in *Babcock & Wilcox* from the instant case is that, in *Babcock*, union organizers had the opportunity to speak with employees on the streets of the town. But, in that case, only 20% of the employees were ever contacted in any way by the union, and the *Babcock* opinion gives no indication of how many of those had the opportunity for face-to-face contact. In the instant case, by contrast, 20.4% of the employees were reached by four different mailings, and the Union had telephone numbers for half of these same employees. The Union also made ten home visits. There does not appear to be any reason for the Union's failure to make home visits to all those employees for which it had addresses, although the Board's opinion does say that many of the employees' parents would not permit their children-employees to come to the telephone. But the point remains that the Union in this case had the opportunity for at least as much face-to-face contact as did the union in *Babcock*. Furthermore, although at first glance the populations in *Babcock* (21,000) and the present one (900,000) appear to be a differentiating factor in favor of the Union, the litmus test indicates otherwise: in both cases the unions were able to *reach* the same percentage of employees, 20%. *See Monogram Models, Inc.*, 192 N.L.R.B. 705 (1971) (size of city, Chicago, did not alone make employees inaccessible in their homes). Thus the size of the communities in question did not affect the ability of the Union to reach its constituency.

Notwithstanding the obvious factual similarity between these two scenarios, the Board, although paying lip service to *Babcock & Wilcox*, concluded that Lechmere violated the Act by denying access by the Union to its property to conduct proselytizing activities. The difference in result between *Babcock & Wilcox* and the present case is the Board's newly-promoted *Jean Country* criteria, the crux of which is its balance-tipping dogma to the effect that barring "exceptional cases," the use of newspapers, radio and television will not be considered a

feasible alternative to direct contact with the employees. Thus, *Jean Country* brings about a skewed result whereby granting non-employee organizers entrance to employers' property to carry out their activities becomes the rule rather than the exception, a classic case of the tail wagging the dog. I can find support in neither the Act nor in *Babcock & Wilcox* for such a rule, and in fact I believe it to be in direct contravention to the Court's holding in that case.

My disagreement with the Board stems from various sources, not least of which is its pointed disregard of the indistinguishable factual basis of the present case with *Babcock & Wilcox*. *See*, *ante* at 34. It is not only in the factual context, however, that *Jean Country* and the Board's decision in the present case transgress the principles laid down by the Court in *Babcock & Wilcox*. The clear impact of *Babcock & Wilcox* is that, in balancing the competing rights of the employer and the union, the Board should take into account the availability of "[t]he *usual* methods of imparting information . . . [by the union, including] . . . [t]he *various* instruments of publicity . . . at hand." *Babcock & Wilcox*, 351 U.S. at 113 (emphasis supplied). Yet the Board, under the guise of fact-finding and "expertise," in one clean swoop not only wipes out these specific directives but declares inexistent and impotent "the usual methods of imparting information" used by the entire advertising and publicity industry. This is a clearly unreasonable and arbitrary conclusion considering that these are the very tools normally used effectively by the political and commercial processes of this country, where in most cases actual personal contact is either minimal or absent. There is, of course, *nothing in this record*, or in *Jean Country*, to support such a wide sweeping conclusion by the Board, whether it be considered a factual or a legal finding.

The Board's ruling in this case, and in *Jean Country*, to the effect that the use of newspapers, radio and television are ineffective methods of imparting information is not entitled to *any*

deference under any of the recognized standards of review, all of which are ably recapitulated by the majority decision, *ante* at 9-10. If this be a factual determination, as stated above, there is not a scintilla of evidence much less "substantial" evidence to support it. *See Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 488 (1951); *see also* 29 U.S.C. § 160(e). If this be the application of law to fact, it is reviewable under the same standard, *see NLRB* v. *United Ins. Co.*, 390 U.S. 254, 260 (1968), and thus fails for the same reason. If the Board's resolution is seen as a mixed question of fact and law, it is entitled to deference only if it is factually reasonable and legally sound, i.e. so long as the Board's conclusion derives *plausibly* from the record. *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 266-67 (1975). This is clearly not the present case, as the record is bare of any such support. The last possibility, one not mentioned by the majority but which would seem to best characterize the real nature of the Board's actions in this case and *Jean Country*, is that the Board has attempted to exercise its rule-making authority. *See* 29 U.S.C. § 156; *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 294-95 (1974). If this be the case, the Board is equally lacking in support for its action, as "it is not entitled to disguise policymaking as fact-finding, and thereby to escape the legal and political limitations to which policymaking is subject." *NLRB* v. *Curtin Matheson Scientific, Inc.*, *supra*, 110 S. Ct. at 1566 (Scalia, J., dissenting). *See* 29 U.S.C. § 156; *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969) (Board cannot replace the rule-making requirements of the Administrative Procedure Act with a rule-making procedure of its own invention).

The principal flaw in the Board's reasoning is that it equates an apparent *lack of interest* by Lechmere's employees with the Union's organizing campaign, with a lack of alternative means to *reach* these employees. The Board misconstrues *Babcock & Wilcox* in this respect. All that *Babcock & Wilcox* assures the Union is the *opportunity to reach* employees through "[t]he

usual methods of imparting information." *Babcock & Wilcox*, 351 U.S. at 113. *Babcock & Wilcox* is not a guarantee of success, it is only a guarantee of an *opportunity to reach* the employees with the Union's message.

The record in this case shows that the Union had ample opportunity to reach the employees. In fact, the Union was able to contact at least as many employees, percentage-wise, as the union in *Babcock & Wilcox*. Furthermore, the Union had a more diverse organizational campaign, and had more means available to impart its information, than did the union in that case, including the ability to carry out a six-month-long informational picket at the entrance to Lechmere's parking lot. Furthermore, the employees' homes in the present case were concentrated in a smaller geographical area than in *Babcock & Wilcox*. Although the total population in that area was considerably larger here than in *Babcock & Wilcox*, as it turns out, this is ultimately a neutral factor in the present case as the Union was able to *reach* the same percentage of employees, 20%, as in *Babcock & Wilcox*. Perhaps, as intimated by the Board's findings, *Lechmere, Inc.*, 295 N.L.R.B. No. 15, at note 10, the lack of receptivity of Lechmere's employees was due to the large number of teenagers composing its work force whose parents were apparently opposed to their children joining the Union. If that be the case, although unfortunate from the Union's viewpoint, it is certainly not a condition for which Lechmere can either be faulted or penalized in the exercise of its property rights.

The bottom line is that the Board has reached a wrong and unsupported conclusion in finding that the Union did not have reasonable alternative means of communicating with Lechmere's employees. In applying the *Babcock & Wilcox* balancing test, the Board, without any basis, labeled means of communication other than personal contact as ineffective. The Board has erroneously displaced the *Babcock & Wilcox* standard, which is reasonable opportunity to *reach* the employees with the union's message, and replaced it with a mechanistic

approach which totally disregards "usual methods of imparting information," and is unfounded on the record.

Examination of previous application of the Supreme Court's standard illustrates how far the Board has deviated from *Babcock & Wilcox* in steering its present course under *Jean Country*. For example, non-employee access was allowed to company property in Alaska where the mining employees lived and worked on an island, and where they could only get to the mainland by chartered seaplane or boat. *Alaska Barite Co.*, 197 N.L.R.B. 1023 (1972), *enf'd, NLRB* v. *Alaska Barite Co.*, 83 L.R.R.M. (BNA) 2992 (9th Cir.), *cert. denied*, 414 U.S. 1025 (1975); *Husky Oil, N.P.R. Operations, Inc.* v. *NLRB*, 669 F.2d 643 (10th Cir. 1982). Access by outside organizers was also granted in the case of company-owned towns, *NLRB* v. *Stowe Spinning Co.*, 336 U.S. 226 (1949), self-contained labor camps, *Petersen* v. *Talisman Sugar Corp.*, 478 F.2d 73 (5th Cir. 1973), isolated resort hotels wherein employees lived on the premises, *NLRB* v. *S & H Grossinger's, Inc.*, 372 F.2d 26 (2d Cir. 1967), and lumber camps in which the employees lived in company-provided and regulated housing, *NLRB* v. *Lake Superior Lumber Corp.*, 167 F.2d 147 (6th Cir. 1948). However, access to the employer's property has been denied to non-employee union organizers in a variety of situations factually relevant to the present circumstances. For example, in *Monogram Models, Inc., supra*, the Board ruled that the union was not entitled to access to the employer's property because it could reach the employees as they drove off a highway and down a 30 foot access road into the plant, and could reach employees at transportation pickup points in the city, or at their homes by mail, telephone and personal visits. The size of the city, Chicago, did not alone make employees inaccessible in their homes. In *Falk Corp.*, 192 N.L.R.B. 716 (1971), the Board denied access where the union was able to pick out the employees' license numbers as they left the plant and thereafter get their home addresses from the state license bureau. A similar result was reached by the Board in *Lee*

Wards, 199 N.L.R.B. 543 (1972), which involved the parking lot of the employer's retail store, in which it was ruled that reasonable access to employees existed because organizers could stand on an easement adjacent to the parking lot and record the license numbers of the cars entering the lot before the employer's retail hours. *See also NLRB* v. *Solo Cup Co.*, 422 F.2d 1149 (7th Cir. 1970). And in *NLRB* v. *Sioux City & New Orleans Barge Lines, Inc.*, 472 F.2d 753 (8th Cir. 1983), the court ruled that a union did not have the right to board river towboats to reach employees who worked shifts of 30 to 60 days, where the record showed that with extra effort, the union could achieve personal meetings with off-duty employees without boarding the towboats. All of the above clearly illustrate that *Babcock & Wilcox* requires that "employees [be] *isolated* from normal contacts," *Babcock & Wilcox*, 351 U.S. at 111 (emphasis supplied), before entry to the employer's property is required.

Jean Country is just another of the Board's periodic attempts to expand *Babcock & Wilcox*, all of which have, in the past, received little encouragement from the courts. A clear example of this was the Board's attempt to apply First Amendment criteria to organizational activity in private shopping centers. Although it met with some initial success, *see Amalgamated Food Employees Union, Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), the Supreme Court eventually rejected this end-run tactic and it is now well-settled that the *Babcock & Wilcox* rationale is controlling. *See Hudgens* v. *NLRB*, 424 U.S. 507 (1976); *Central Hardware Co.* v. *NLRB*, 407 U.S. 539 (1972).

Although adaptation of the Act "to changing patterns of industrial life is entrusted to the Board," *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. at 266, thus allowing the Board to reappraise prior rulings, "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a

consistently held agency view." *I.N.S.* v. *Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987). At the very least, "an agency changing its course . . . is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency . . . act[s] in the first instance." *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). It is this reasoned analysis which the Board has failed to provide. *Ex cathedra* dogma is hardly reasoned analysis, particularly when we consider that what the Board is attempting to accomplish is the reversal of Supreme Court doctrine. Such imperious conduct can hardly be countenanced from an administrative agency which the law prohibits from acting in an arbitrary or capricious fashion. 5 U.S.C. § 706(2)(A); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951).

For the above reasons, I respectfully dissent.

United States Court of Appeals
For the First Circuit

No. 89-1683.

LECHMERE, INC.,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

DECREE

ENTERED: September 17, 1990

This cause came on to be heard on petition for review and cross-application for enforcement of an order of the National Labor Relations Board, and was argued by counsel.

UPON CONSIDERATION WHEREOF, IT IS NOW HERE ORDERED ADJUDGED, AND DECREED AS FOLLOWS: The petition for review is denied, and the order of the National Labor Relations Board is affirmed and enforced.

By the Court:
FRANCIS P. SCIGLIANO
Clerk

[cc: Messrs. Joy and Cohen]

APPENDIX B

JHD

295 NLRB No. 15

D—9685
Newington, CT

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 39—CA—3571

LECHMERE, INC.

AND

LOCAL 919, UNITED FOOD AND COMMERCIAL WORKERS, AFL-CIO

DECISION AND ORDER

On September 30, 1988, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions and a supporting brief as well as a supplemental brief[1] and the General Counsel filed cross-exceptions and a supporting and reply brief in which the Charging Party joined.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[2] findings, and conclusions, as explained below,

[1] The Respondent has requested oral argument. The request is denied as the record exceptions and briefs adequately present the issues and the positions of the parties.

[2] The Respondent and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear prepon-

and to adopt the recommended Order.[3]

The judge found that the Respondent violated Section 8(a)(1) of the Act by denying access to its parking lot to nonemployee union organizers for the purpose of distributing leaflets and handbills to employees and by attempting to remove the union organizers from a 10-foot-wide strip of public property abutting its parking lot and the Berlin Turnpike. The judge found no violation of Section 8(a)(1) in the Respondent's installation of a video camera on the roof of its store to monitor the exterior areas adjacent to the store. We agree with the judge, but base our finding that the Respondent violated Section 8(a)(1) by denying the union organizers access to its parking lot on the analysis set forth in *Jean Country*, 291 NLRB No. 4 (Sept. 27, 1988).

In *Jean Country*, the Board reevaluated the analytical approach for resolving conflicts between Section 7 and private property rights set forth in *Fairmont Hotel*, 282 NLRB No. 27 (Nov. 13, 1986), and clarified that the availability of reasonable alternative means is a factor that must be considered in every access case in which a legitimate property interest and a Section 7 right must be accommodated.[4] The Board further held (slip op. at 9-10):

> Accordingly, in all access cases our essential concern will be the degree of impairment of the Section 7 right if access should be denied, as it balances against the degree of impairment of the private property right if access should

derance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We attach a modified notice to conform the language with the judge's recommended order.

[4] In reaching this conclusion the Board emphasized that, under the Supreme Court's decision in *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956), and *Hudgens* v. *NLRB*, 424 U.S. 507 (1976), the Board is "charged with seeking to avoid the destruction' of [Sec. 7 and property] rights, if at all possible, and with permitting infringements on one right only to the extent necessary to maintain the other." *Jean Country*, slip op. at 5-6.

> be granted. We view the consideration of the availability of reasonably effective alternative means as especially significant in this balancing process. In the final analysis however, there is no simple formula that will immediately determine the result in every case.

The Board in *Jean Country* found that the following factors may be relevant to assessing the weight of a property right: the use to which the property is put; the restrictions, if any, that are imposed on public access to the property; and the property's relative size and openness. The factors that may be relevant to the consideration of a Section 7 right include: the nature of the right; the identity of the employer to which the right is directly related (e.g., the employer with whom a union has a primary dispute); the relationship of the employer or other target to the property to which access is sought; the identity of the audience to which the communications concerning the Section 7 right are directed; and the manner in which the activity related to that right is carried out. Finally, factors that may be relevant to the assessment of alternative means include: the desirability of avoiding the enmeshment of neutrals in labor disputes; the safety of attempting communications at alternative public sites; the burden and expense of nontrespassory communication alternatives; and the extent to which exclusive use of the nontrespassory alternatives would dilute the effectiveness of the message.

Applying the *Jean Country* analysis to this case, we initially find that the Respondent owns the Newington Lechmere store and the land occupied by, and immediately surrounding, the store. The Respondent also shares ownership in the parking lot adjacent to the store with the operators of a strip of 13 stores. The parking lot is available for use by patrons and employees of all the stores. Only 4 of the 13 stores were open and there were two public telephones in front of the strip stores when nonemployee union organizers sought to contact the Respondent's employees in June 1987. The Respondent maintains and

enforces rules against solicitation and distribution on its premises, and in the parking lot with the authorization of the operators of the strip of stores. We conclude that the Respondent's property right at issue is relatively substantial but note that the parking lots are essentially open to the public.[5]

The Section 7 right asserted is relatively strong. As the Supreme Court has indicated: "[T]he right to organize is at the very core of the purpose for which the NLRA was enacted. . . . [T]he interests being protected . . . are not those of the [non-employee union] organizers but of the employees located on the employer's property."[6] Here the Union targeted the parking lot used by the affected employees at their work site as the locale for invoking the organizational rights of those employees. As the Union's attempts to distribute handbills to the employees neither impeded traffic flow nor interfered with the normal use of the parking lot, the Respondent's business was not disrupted or its customers inconvenienced to any significant degree by the handbilling.[7] Accordingly, we find that consideration of the factors of the situs of the Union's conduct and the manner of that conduct does not diminish the strength of the core Section 7 right asserted. Under the circumstances, we find that the Section 7 right is certainly worthy of protection against substantial impairment.

Further, we find that there was no reasonable, effective alternative means available for the Union to communicate its message to the Respondent's employees. Thus the Board in *Jean Country* noted that only in "exceptional" cases will the use of newspaper, radio, and television be feasible alternatives to direct contact.[8] And we find that the present case is not an exceptional one. Newington, Hartford, and New Britain com-

[5] *Mountain Country Food Store*, 292 NLRB No. 100 (Feb. 10, 1989).

[6] *Sears, Roebuck & Co.* v. *San Diego County District Council of Carpenters*, 436 U.S. 180, 206 fn. 42; citing *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956).

[7] The Respondent's assertions that the Union engaged in trespassory forays onto its property are not evidence of such disruption or inconvenience.

[8] *Jean Country*, *supra*, slip op. at 7.

pose a large "suburban-urban" area. The evidence shows that almost all the Respondent's approximately 200 employees live in these three communities that are serviced by local newspapers in which the Union placed advertisements seeking authorization for representation from the Respondent's employees. A newspaper's general circulation, however, is not evidence of receipt of a discrete message intended for a specific audience. Many of the Respondent's employees may never receive, purchase, or read these local newspapers, or may be exposed to them only occasionally.[9] Thus, this method of communication is both expensive and ineffective.

The evidence also shows that the Motor Vehicle Registry provides on request names and addresses pertaining to license plate numbers. By observing cars in the Respondent's parking lot, the Union thereby obtained 41 names and addresses of the Respondent's approximately 200 employees.[10] However, it is clear that even with diligence and perseverance, that method of obtaining employee names and addresses is flawed. Cars driven by patrons of the Respondent's stores as well as patrons and employees of the other stores in the complex frequent the parking lot daily. Even should the Union observers focus on the area where the Respondent's employees are encouraged to park their cars at times when these employees would be arriving at or departing from the store, obstacles to comprehensive tallying of names and addresses are manifest. Employees may use cars that are not registered in their names, may car pool together, may use alternative means of transportation, or may park elsewhere. In addition, part-time employees might not use the parking lot at those times shortly before and after the

[9] The advertisements used by the Union included an "Authorization for Representation" form with the admonition to complete and mail. The Respondent removed the advertisements from the newspapers delivered to its store.

[10] To these 41 employees, the Union sent 4 consecutive mailings. The Union also telephoned about a quarter of these employees (approximately 20 of the 41 had unlisted numbers) but often was unable to reach teenage employees whose parents refused to let them come to the phone to speak with the union organizers. The Union also made 10 home visits.

store's designated opening hours. Accordingly, the effectiveness of the Union's resorting to the Motor Vehicle Registry as a comprehensive source of the names and addresses of the Respondent's employees is patently minimal.

Finally, the evidence also shows that the 10-foot-wide strip of public property abutting the Berlin Turnpike offers an ineffective and unsafe locale for the union activity. The turnpike is a four-lane highway with a 50 m.p.h. speed limit. The presence of other stores in the immediate vicinity of the complex containing the Respondent's store suggests that the area is commercial in character and that traffic is more than minimal. Further contributing to the safety problem presented by this location is the lack of a traffic signal or stop sign at the turnpike entrance to the parking lot. The entrance is not limited to the Respondent's employees but also provides access for employees of the other stores in the complex and customers of all the stores. Indeed, the police summoned by the Respondent on June 20, 1987, cautioned the union organizers to be careful neither to impede traffic nor to endanger themselves when positioned on the 10-foot-wide strip of public property.

Accommodating the private property and Section 7 rights pursuant to our analysis in *Jean Country*, we find that the Respondent's property interest would suffer some impairment by granting the Union access to the Respondent's parking lot. We conclude that the impairment would not be substantial, however, in light of the unobtrusive manner in which the Union carried out its distribution of leaflets and the fact that the Respondent's parking lot is essentially open to the public. By contrast, in the absence of a reasonably alternative means of communication, the Union's Section 7 right would be "severely impaired — substantially 'destroyed' within the meaning of *Babcock & Wilcox*"[11] without entry onto the Respondent's property. Thus, we find that the degree of impairment of the Union's Section 7 right if its agents were denied access to the Respondent's parking lot to distribute

[11] *Jean Country*, *supra*, slip op. at 24.

organizational literature outweighs the degree of impairment of the Respondent's property right if access were granted. Accordingly, we affirm the judge's conclusion that the Respondent violated Section 8(a)(1) of the Act by barring representatives of the Union from engaging in organizational handbilling in the parking area of the Respondent's Newington store.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Lechmere, Inc., Newington, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. June 15, 1989.

WILFORD W. JOHANSEN, *Member*

JOHN E. HIGGINS, JR., *Member*

DENNIS M. DEVANEY, *Member*

(SEAL)

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT prohibit representatives of Local 919, United Food and Commercial Workers, AFL-CIO, or any other labor organization, from distributing union literature to our employees in the parking lot adjacent to our store in Newington, Connecticut, nor will we attempt to cause them to be removed from our parking lot for attempting to do so, as long as the activity is conducted by a reasonabie number of persons, and does not unduly interfere with the normal use of the parking lot, or the traffic flow from the Berlin Turnpike.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them in Section 7 of the Act.

LECHMERE, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1 Commercial Plaza, Hartford, Connecticut 06103-3599, Telephone 203-240-3373.

JD(NY)-81-88
Newington, CT

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

Case No. 39-CA-3571

LECHMERE, INC.

AND

LOCAL 919, UNITED FOOD AND COMMERCIAL WORKERS, AFL-CIO

Thomas Meiklejohn, Esq.
for the General Counsel.
J. William Gagne, Esq., and
Barbara Collins, Esq.,
for the Charging Party.
Robert P. Joy, Esq.,
Morgan, Brown, & Joy,
for the Respondent.

JOEL P. BIBLOWITZ, *Administrative Law Judge:* This case was heard by me on May 16 and 17, 1988 in Hartford, Connecticut. The Complaint herein, which issued on November 18, 1987,[1] and was based upon an unfair labor practice charge filed by Local 919, United Food and Commercial Workers, AFL-CIO, herein called the Union, alleges that Lechmere, Inc., herein called Respondent, violated Section 8(a)(1) of the Act in the following manner: (1) On about June 14 refused to permit representatives of the Union to engage in organizational picketing and handbilling in the parking area at its Newington store. (2) On about June 20, attempted to cause representatives of the Union to be removed from public prop-

[1] Unless, indicated otherwise, all dates referred to herein are for the year 1987.

erty adjacent to the parking area of the store, where they were attempting to distribute organizational handbills to occupants of vehicles. (3) Since about July 15 has operated a revolving video camera on the roof of the facility, thereby engaging in surveillance of its employees' union activities.

Upon the entire record, including the briefs received from the parties, I make the following:

Findings of Fact

I. Jurisdiction and Labor Organization Status

There being no dispute, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2),(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Facts

A. *Background*

Respondent operates a number of stores selling "hard goods", *i.e.*, televisions, audio equipment, appliances and watches, but not clothing. The only store involved herein, hereby referred to as the store, is located in Newington, Connecticut, on the west side of the Berlin Turnpike, a four lane divided highway with a 50 mile per hour speed limit. The store is located on a parcel of land bounded on the east by the Berlin Turnpike and on the north by Pascone Street. The parcel measures approximately 880 feet from north to south and 740 feet from east to west. The store is located at the south end of the property. A main parking lot is to the north of the store and extends to Pascone Street. A smaller parking area is located to the east of the store. A strip of 13 small "satellite stores" runs along the west side of the parcel facing the parking lot; there are no restaurants or convenience

among these satellite stores. As of June 1987, only about 4 [sic] these stores were occupied. These stores are not owned by Respondent, and are approximately 100 feet from the store at the nearest point. There are two public pay telephones located in front of the satellite stores; there are also public phones inside the store that are not visible from the outside. Ownership of the parcel of land is divided among Respondent and Newington Commercial Associates Limited Partnership, herein called Newington Commercial. Respondent owns the land occupied by and immediately surrounding its store. Newington Commercial owns the satellite stores. The remainder of the parking lot is jointly owned by Respondent and Newington Commercial. Konover Management Corporation, a general partner in Newington Commercial Associates, has management responsibility for the satellite stores. A grassy strip approximately 46 feet wide runs the entire length of the property along the Berlin Turnpike, with the exception of two breaks in that strip for entrances to the parcel. The 42 foot width of that grassy strip along the Berlin Turnpike is public property. The remainder of the grassy strip is Respondent's property.

There are three entrances to the property; the main entrance is from the Berlin Turnpike. It begins with an opening through the grassy strip (actually, two openings, one an entrance and the other an exit) referred to, *supra*, and it continues in a westerly direction on the north side of the main entrance to the store and continues to, and ends at, the satellite stores. The principal parking area for the store and the satellite stores is on the north side of this road. At this main entrance, the grassy strip continues in a westerly direction for an additional distance (approximately fifty feet) on the north side of the entrance only; this patch of land, admittedly owned by Respondent, will be referred to herein as the dog leg. There is another entrance to the property from Pascone Street, north of the store (and east of the satellite stores), and facing the front end of the store. This is the furthest entrance from the store and feeds into the main parking area. The final entrance to the

property is at the most southerly point of the property, going from the Berlin Turnpike to the rear of the store. This entrance is meant for deliveries to Respondent and connects to a loading dock at the rear (south end) of the store.

There are two entrances to the store; the main entrance, which faces north and the main parking area, and a pick up entrance on the east side of the store (across from the grass strip just south of the main entrance) facing a small parking area principally used by customers picking up parcels at the store. The principal parking area is north of the store, between it and Pascone Street. Employees are requested to park in the most easterly portion of this area closest to the grass strip and the Berlin Turnpike, and to enter the store through the pick-up entrance.

Grossman's Home Improvement Center store is located south of the store, separated by a fence running east to west behind the store; the fence does not extend across the grass strip. There is a sign located at the main entrance to the property which identifies two of the stores on the parcel, "Lechmere" and "Card Gallery." There are no signs in the parking lot announcing any restrictions on access to or use of the parking lots other than signs identifying certain parking spaces as "Handicapped Parking." There are two 6" by 8" signs on each set of doors to Respondent's store which read, "TO THE PUBLIC. No Soliciting, Canvassing, Distribution of Literature or Trespassing by Non-Employees in or on Premises."

Respondent established a No Solicitation/No Distribution policy in 1982 that has remained in effect to the present time; the only change in the policy was to change the word "employee" to "associate" in 1986 when Respondent began referring to its employees as associates. The policy states:

> Solicitation of associates in the work areas during working time is strictly prohibited. It is strictly prohibited in all selling and public areas at all times. Non-working time includes break periods, meal periods and other specified

> periods during the work day when associates are properly not engaged in performing their work tasks. Distribution of literature in work areas and public selling areas is prohibited.
>
> Non-associates are prohibited from soliciting and distributing literature at all times anywhere on Company property, including parking lots. Non-associates have no right of access to the non-working areas and only to the public and selling areas of the store in connection with its public use.

Beginning on June 16 the Union placed advertisements in newspapers in an attempt to organize the employees at the store; at the time Respondent employed approximately two hundred employees at the store, none of whom were represented by a union. The first ad, and later ads as well, was addressed to Respondent's employees, told of the better benefits available with the Union, and included a Union authorization card, with the caption: "Mail Today" or "Mail it Now."

B. *Events of June 18*

Lisa Meuci, organizer for the Union testified that on June 18 she and other Union representatives went to the facility between 9:15 and 9:30 a.m. and placed handbills on the cars that arrived and parked between 9:30 and 10:00 a.m., assuming that they were employees (the store opens for business at 10:00 a.m.).[2] In addition, Union organizer Giovano Casserino handed a leaflet to an employee who was walking toward the store, but a security guard took the leaflet from the employee. Roger Samuelson, the general manager of the store, testified that on June 18 Union representatives were in the parking lot

[2] Shortly after the store opened that morning, the Union's representatives attempted to distribute literature to employees in the store until they were stopped from doing so by Respondent's representatives.

on three occasions placing leaflets[3] on car windshields. On these occasions, they were in the area where employees usually park and he instructed the security guards to remove the literature from the cars (which they did) and he and the assistant store manager, Steve Mittler, asked the Union representatives to leave the parking lot.

C. *The Events of June 20*

The events of this day are more substantial, as is the credibility issue between the version testified to by the four Union representatives and the testimony of Samuelson. Meuci testified that at about 9:30 a.m. she met the other Union representatives at the Bradlee's store parking lot across the street (east) from the store; they then drove to the Grossman's store just south of the store and from there walked north up the grassy strip to the main entrance to the parking lot. They stood on the grassy strip within a few feet from the Berlin Turnpike, on both sides of the main entrance to the parking lot (between 9:30 and 9:40 a.m.) attempting to give handbills to drivers entering the parking lot at this point (assuming that they were employees). About three to five minutes later (before they had handed out any literature) Samuelson, Mittler and three security guards came out of the store and said that they were on Respondent's property and asked them to leave. They said that they thought that since they were on the grassy strip near the Berlin Turnpike that they were on public property. Samuelson said that it was Respondent's property, and unless they left he would call the police. When they did not leave Samuelson went into the store to call the police. Ten minutes later the police arrived and questioned the Union representatives about their purpose. Officer Gallagher told them that they were on public property, but that they were so close to the Berlin

[3] The leaflets used by the Union on June 18 and thereafter extolled the advantages of the Union and had an attached Union authorization card for the employees to complete and a stamped self-addressed envelope.

Turnpike that it could be dangerous remaining there if they were not careful. Gallagher then spoke privately with Samuelson, after which he called his sergeant. Before leaving, Gallagher told the Union representatives that they could remain, but they couldn't obstruct the traffic flow on the highway or leading into the parking lot. Because the security guards continued to videotape their movements, Meuci and the others then left the area.[4]

Casserino testified that he met Meuci, Mark Espinosa (Union business representative) and Cliff Gagnon (recording secretary of the Union) that morning in the Bradlee's parking lot and they drove to Grossman's parking lot. From there they walked north on the grassy strip to Respondent's parking lot where they stood by the main entrance to the parking lot about four feet from the Berlin Turnpike. About five minutes later Samuelson came out of the store and told them to leave. They protested they were on public property and wouldn't leave. Samuelson said that it was Respondent's property and they should leave immediately. They refused. About five minutes later two policemen arrived. One asked what they were doing; they said that they were on public property attempting to speak to employees on their way to work. The officer went to speak to Samuelson and when he returned he told them that since they were on public property they could remain, but they should be careful because of the speed of the nearby traffic. At no time that day did the Union representatives leave the area about four feet from the Berlin Turnpike and enter Respondent's property and at no time after the police arrived did Samuelson or any other representative of Respondent tell them to leave.

Espinosa testified that he met the other Union representatives that morning at Bradlee's parking lot and walked (by himself) across the Berlin Turnpike to the grassy strip on the

[4] The affidavit she gave to the Board states: "The police explained to the employer that we were on state property, but he told us we might disrupt traffic flow and must leave. We left."

side of the main entrance to Respondent's parking lot where he met the others. He and the others stood there, about four feet from the Berlin Turnpike ("We figured that's where we had a right to be"). Respondent's representatives approached them and Samuelson said that they had to leave Respondent's property. They said that they had a right to be there and Espinosa asked if Respondent owned the property all the way to the Berlin Turnpike. Samuelson asked them if they were going to leave and they said that they weren't and he said that he would call the police. When the police arrived they told the police that they were there to distribute literature and felt that they had a right to be there, but that they didn't want to cause any problem, and if they were asked to leave, they would do so. The policeman then spoke to Samuelson for a few minutes; when he returned he told them that they had a right to remain there as long as they remained within ten feet of the curb, but that they should be careful because of the speed of the cars on the Berlin Turnpike. From the time he arrived he never left the area about four feet from the Berlin Turnpike until they left after the police spoke to them. They left the premises that day, but not because they were requested to do so by Samuelson; in fact, Samuelson never spoke to them, again, after the police arrived. Gagnon testified that he met the other Union representatives at the Bradlee's parking lot that morning; they then drove to the Grossman's parking lot and walked along the grassy strip to the entrance to the parking lot of Respondent's store arriving at about 9:30 a.m. They stood a few feet from the Berlin Turnpike preparing to give leaflets to cars entering the parking lot. Within a short time Samuelson came out of the store and told them to leave because they were on Respondent's property. Gagnon (and the others) said that they were on public property and had a right to be there. Samuelson said that Respondent owned the entire area including the grassy strip and asked them to leave. When they refused to leave he said that he would call the police. A few minutes later the police arrived; they first spoke to Samuelson and then asked

the Union representatives what they were doing. Gagnon told him that they were attempting to give handbills to employees entering the parking lot and that Samuelson had said that they were on private property and he had disagreed. After the police officer called his office he told them that they were on public property. The police left and the Union representatives remained in the same place for about five minutes and then left: "We'd proved our point, that we could stay on the grassy area."

Samuelson testified that at 9:22 a.m. on June 20, Gagnon and Espinosa drove into the parking lot at Respondent's store and began putting leaflets on cars parked in the parking lot. Samuelson then told them of Respondent's no-solicitation rule and they left and drove their car into Grossman's parking lot. About twenty minutes later Gagnon and Espinosa (together with Meuci and Casserino) were back in Respondent's parking lot (they had walked from Grossman's) on the dog leg of the grassy strip at the main entrance to the parking lot, about one hundred feet from the Berlin Turnpike. As stated, *supra*, this property is owned by Respondent.[5] Mittler and Samuelson told them of the no-solicitation rule and asked them to leave; when they did not leave Samuelson called the police. Prior to the police arriving, one of the Union representatives asked Samuelson what part of the area Respondent owned and asked if they owned the Berlin Turnpike. Samuelson said that of course they didn't, but he never specified where the dividing line was between their property and public property. The police arrived and asked what the problem was; Samuelson said that they were trespassing on his property and he wanted them to leave. The officer then spoke to the Union representatives and returned and told Samuelson that he told them that they could remain on the public area, but had to stay off Respondent's property.

[5] In an Incident Report that Samuelson prepared that day, he stated that he saw the four individuals in "the grass area" (which could describe the grassy strip as well as the dog leg) and never specified that they were on Respondent's property.

I was happy with that solution, because that was my intention, to keep them off of Lechmere property, and had full knowledge that they had the right to be on the public way.

The police left, as did the Union representatives five or ten minutes later. On cross-examination Samuelson testified that when he initially saw that the Union representatives had returned to Respondent's parking lot, they were on the dog leg (Respondent's property), but by the time he approached them and told them to get off Respondent's property, they were on the grassy strip (public property). Regardless of the fact that they were on public property he still told them to get off Respondent's property. He was then asked if he told them that he was going to call the police, even though they were then on public property; he testified: "The police had already been called, as I was coming out the door." The Incident Report referred to *supra*, states: "I then told them I would call the police if they did not leave our property. They didn't leave so we called the police."

D. *Other Union Attempts to Contact Employees*

In addition to the newspaper advertisements referred to *supra*,[6] the Union was able to obtain the name and addresses of forty one nonsupervisory employees of Respondent by writing the license number of their car. In Connecticut, the Department of Motor Vehicles will give you the name and address of the owners of automobiles if you supply the license plate number. Meuci testified that they made phone calls and house calls to these employees, but they were generally unsuccessful because the employees were often high school students and "generally the parents would intervene" and not allow

[6] The advertisements were placed in the Hartford Courant, one of the largest circulation newspapers in Connecticut. Meuci testified that she was told that its circulation covers Hartford, New Britain and Newington, among other areas.

them to talk to their children, the employees. This was the result of about ten home visits and eight or nine telephone calls by Meuci. In addition, using the name and address list received from the Department of Motor Vehicles, Respondent sent four mailings to the forty one employees listed; these mailings told of the benefits of joining the Union and included Union authorization cards; only one employee returned a signed authorization card.

Samuelson testified that in June one hundred seventy-nine of the two hundred employees of Respondent resided in Newington, Hartford and New Britain; the maximum distance between these points is about fifteen miles.

E. *Prior Enforcement of No-Solicitation*

Samuelson testified to a number of other occasions where he acted to enforce Respondent's no-solicitation rule. Shortly after the store opened for business in November 1966 [sic], Samuelson observed that someone had put leaflets advertising the American Automobile Association (AAA) on cars in the parking lot; he had the leaflets removed, called the AAA and told the branch manager that Respondent had a no-solicitation policy and could not allow them on the property to solicit or distribute handbills. In about November 1986 Samuelson received a telephone call from the Salvation Army, asking if they could station one of their bell-ringers in front of the store for the Christmas season: "I had to tell them no, again based on our no-solicitation policy. And wished them well with their campaign, but it would have to be not on Lechmere property." A few months later cents-off coupons from Burger King were found on cars in the parking lot; Samuelson called the store manager and told him of Respondent's no-solicitation rule and that such distributions would not be allowed. A few months later, two Girl Scouts were selling cookies in front of the store; he told them of Respondent's no-solicitation policy and that they would have to leave, and they did.

Samuelson testified that the purposes of the rule are to keep people from harassing Respondent's customers ("shaking cans in your face . . . asking to buy raffle tickets or cookies . . .") and to keep "illegal trespassers" off the property thereby preventing incidents or other confrontations in the parking lot. Samuelson testified that illegal trespassers would be "anyone that would be coming to the store not for the purpose of shopping, but for the purpose of distributing literature, raising funds for a church, a bake sale. . . ." He testified that when he was first told of the rule he was not told that one purpose of it was to keep union solicitors off the premises. Samuelson was asked whether one of the reasons he attempted to keep the employees from receiving the Union's leaflets was to make it less likely that the Union would successfully organize his employees. He testified: "It's very difficult to answer. I think my primary reason was to continue the consistent enforcement of the no solicitation policy."

F. *Video Camera*

The final allegation herein is that by placing a video camera on the roof of the store on July 23 Respondent violated Section 8(a)(1) of the Act. Samuelson testified that of the twenty-four stores operated by Respondent, sixteen to eighteen have video cameras. At the store in question, the loss prevention office has nine television monitors, each of which is a closed circuit television system with a camera and monitor. Only one of these cameras (with attached monitor) — the one on the roof — is in question here. The picture from only one of these monitors can be taped at any one time. Samuelson testified that the video camera was ordered on July 21 or 22 and installed on the roof to monitor illegal activity in the parking lot and to assist with in-store security. As regards the former, there have been situations where a car window was broken and car radios was [sic] stolen; the video camera assisted Respondent on one such occasion where they observed such an incident occurring, the

police were called and the perpetrator was apprehended. As regards the latter, the rooftop video camera gives the security officer in the store the ability to follow the path of a suspected shoplifter as he leaves the store.

The Union picketed the grassy area regularly from August 7 through September 5, then intermittently from October through March 1988; these pickets were never asked to leave by Respondent's representatives. During the first few days of this picketing in August, the rooftop video camera was directed at some of the pickets and the proceeding was being videotaped ("because I had no idea what was going to happen"). After several days Respondent ceased focusing the camera on the pickets ("Because nothing had happened that would be of any significant matter.").

Charles Lieberman, who was employed by Respondent from about September 1986 (when the store opened for business) through October, testified that at a regular meeting of employees subsequent to the installation of the video camera, somebody asked Samuelson why the camera was installed; "Mr. Samuelson said basically two things. One for general security. And, two, in order to assure that the Union people wouldn't be harassing customers or possibly vandalizing cars. That kind of thing."

III. Analysis

The initial allegation in the complaint is that since on about June 14 (really June 18) Respondent has refused to permit Respondent's [sic] representatives to engage in organizing and handbilling in the parking area adjacent to the store. The evidence establishes that between 9:30 and 10:00 a.m. on June 18 the Union representatives placed handbills on the cars parked in the area frequented by employees, but these handbills were removed at the request of Samuelson. Casserino handed a leaflet to an employee, but a security guard took the leaflet from the employee. In addition, Samuelson and Mittler asked

the Union representatives to leave the parking lot because it was Respondent's property.

In *Fairmont Hotel Company*, 282 NLRB No. 27 the Board set forth the balancing test to be used in situations such as the instant matter. The Board discussed *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956) and *Hudgens* v. *NLRB*, 424 U.S. 507 (1976) and determined that in cases involving conflicts between property rights and Section 7 rights, the Board's task is "first to weigh the relative strength of each parties' claim."

> If the property owner's claim is a strong one, while the Section 7 right at issue is clearly a less compelling one, the property right will prevail. If the property claim is a tenuous one, and the Section 7 right is clearly more compelling, then the Section 7 right will prevail. Only in those cases where the respective claims are relatively equal in strength will effective alternative means of communication become determinative.

Fairmont (and later cases such as *United Supermarkets, Inc.*, 283 NLRB No. 130 and *Emery Realty, Inc.*, 286 NLRB No. 32) then speaks of factors affecting the strength and weakness of the employer's property rights and the Union's Section 7 rights. Applying the *Fairmont* criteria to the instant matter, I find the Union's Section 7 rights more compelling than Respondent's property rights. This is not an area standards dispute a union has with a secondary employer as in *Fairmont;* this is the Union's attempt to organize Respondent's employees. As the Supreme Court stated in *Sears Roebuck & Co.* v. *San Diego County Council of Carpenters*, 436 U.S. 180 (1978): "the right to organize is at the very core of the purpose for which the NLRA was enacted." In addition, the Union's activity was such that there was little likelihood that Respondent's customers, or the employees of the few satellite stores then open, were affected because the Union placed handbills

only on cars parked in the area where Respondent's employees were told to park (not the most convenient to the main entrance to the store) and generally did so before the store opened at 10 a.m. By contrast, Respondent's property rights are not as compelling. Although Respondent has uniformly enforced its no-solicitation/no-distribution policy since the store opened in November 1986, there are no signs at the entrances to the parking lot limiting entry in any way. The Board, in *Fairmont, supra*, at p. 8 differentiated between a multi-store mall and a single store:

> the owner of a large shopping mall who allows the general public to utilize his property without substantial limitation may well have a heavy burden to bear in seeking selectively to exclude pickets who are engaged in an economic strike against their employer who is a tenant of the mall. On the other hand, a single store surrounded by its own parking lot provided exclusively for the convenience of customers will have a significantly more compelling property right claim.

Although the situation herein did not constitute a "large shopping mall" on June 18, it clearly was not a "single store surrounded by its own parking lot" as stated in *Fairmont*. Four of the thirteen satellite stores were open at the time and it is not unreasonable to assume that a large majority of the customers of these stores drove through the main entrance to the parking lot, and that some of these customers shopped at the store, as well as one or more of the satellite stores then open. Although the only "visible" pay telephones are in front of the satellite stores and there are no food or convenience stores or restaurants in the center, that does not diminish the fact that this is a shopping mall and that Respondent's property rights are subordinate to the Union's Section 7 rights herein. I therefor find that Respondent's actions on June 18 violated Section 8(a)(1) of the Act.

As I have found that the rights asserted by the Union and the Respondent are not relatively equal, it is unnecessary to consider reasonable alternative means available to the Union in attempting to communicate with the employees, *Fairmont, supra*. However, should my finding herein not be upheld, subsequently, I should state that the facts herein convince me that reasonable alternative means were available to the Union. Employees were easily recognizable here; they parked in specified areas and arrived at predictable times. Even if the Union representatives were unable to converse with them prior to entering the store, the Union could (and did) utilize the procedure of writing their license numbers and obtaining their names and addresses from the Connecticut Department of Motor Vehicles. The fact that a large majority of the employees rejected their solicitations does not distract from this; *Fairmont* does not require that the Union be successful in its contacts with employees, only that there are reasonable alternative means of communicating with them. In addition, the store is located in an urban-suburban area with one newspaper capable of reaching all or almost all of Respondent's employees. For these reasons I find that there were adequate alternate means of contacting the employees available to the Union.

It is next alleged that on June 20, Respondent, by Samuelson, attempted to cause the Union representatives to be removed from the public property adjacent to the parking lot, in violation of Section 8(a)(1) of the Act; I credit the testimony of the four Union representatives over that of Samuelson. Their testimony that they solicited solely on public property a few feet from the Berlin Turnpike is reasonable after their solicitation in the parking lot two days earlier had been rebuffed. In addition, although Samuelson appeared to be a credible witness, his testimony on this subject is difficult to understand. On direct examination he testified that when he saw them at about 9:47 a.m. they were on the dog leg (Respondent's property) and he called the police. According to his testimony on

direct examination, they did not leave the dog leg and stay on public property until after the police arrived. On cross-examination he testified that by the time he approached them they were on public property. He was asked why he asked them to leave if they were on public property and he testified that the police had already been called. Yet his Incident Report states that he told the Union representatives that unless they left "our property" he would call the police; when they refused to leave, he called the police. He never explained this contradiction. What is clear, however, is that when Samuelson did tell the Union representative to leave, they were on public property, where they had a right to be. As the Board stated in *Mike Yurosek & Son*, 229 NLRB 152 at 153: "If the alley were clearly public property, Respondent's attempts to exclude union representatives therefrom would be unlawful under Section 8(a)(1) of the Act." Samuelson's attempt to cause the Union representatives to be removed on June 20, when they were on public property, therefore violates Section 8(a)(1) of the Act.

Finally, the Complaint alleges that by installing the revolving videotape camera on the roof of the store on July 23, Respondent violated Section 8(a)(1) of the Act. An employer may photograph or videotape certain activities outside his plant without violating the Act where he can establish a legitimate purpose for this activity. *Russell Sportswear Corporation*, 197 NLRB 1116; the principal means of justification for this activity is to secure evidence for injunction proceedings to enjoin strike related conduct or to establish that the picketing was unlawful under the Act. *Bozzuto's Inc.*, 277 NLRB 977. Peaceful union activity cannot be a motivating factor in an employer's institution of a videotaping system. *Cutting Incorporated*, 255 NLRB 534, 543. Respondent does not defend on the basis that it was gathering evidence for a state court or Board injunction. Rather Samuelson testified that most of Respondent's stores supplement their in-store video security system with a rooftop camera and that was the purpose of this

camera — to monitor any illegal activity occurring in the parking lot and to allow the store's security people to "follow" a shoplifter (or other wrongdoer) out of the store via the video camera. Lieberman's testimony is not decisive here; he testified that Samuelson told the employees that the video camera was installed for general security and to assure that the Union people would not harass customers or vandalize cars in the parking lot. Although the Union representatives did enter the store on June 18 and attempted to speak to, or leave literature for, employees at that time, there is certainly no evidence that they harassed customers or vandalized cars at that time or at any time prior to July 23. On the other hand, I find credible and reasonable Samuelson's testimony that most of Respondent's stores have rooftop cameras and that the timing of the purchase of the camera for the store was not out of the ordinary compared with Respondent's other stores. For this reason (although not free from doubt) I find that the installation of the video camera on the roof of the store did not violate Section 8(a)(1) of the Act.

Conclusions of Law

1. Respondent, Lechmere, Inc., is an employer engaged in commerce within the meaning of Section 2(2),(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by refusing to allow the Union representatives to engage in organizing and handbilling in the store's parking lot and by attempting to cause the Union representative to be removed from a public area adjacent to the parking lot.

4. Respondent did not violate the Act as further alleged in the Complaint.

The Remedy

Having found that Respondent has violated Section 8(a)(1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact, conclusions of law and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[7]

The Respondent, Lechmere, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Prohibiting union representatives from distributing union literature to its employees in the parking lot adjacent to its store in Newington, Connecticut, and threatening them with arrest for attempting to do so, as long as the activity is conducted by a reasonable number of persons, and does not unduly interfere with the normal use of the parking lot, or the traffic flow from the Berlin Turnpike.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post at its Newington, Connecticut, store copies of the attached notice marked "Appendix."[8] Copies of said

[7] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order shall, as provided by Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[8] In the event that the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall

notice, on forms provided by the Regional Director for Region 34, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 34, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C. September 30, 1988.

/s/ JOEL P. BIBLOWITZ
JOEL P. BIBLOWITZ
Administrative Law Judge

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read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

JD(NY)-81-88

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing in which all parties were afforded the opportunity to present evidence, it has been found that we violated the National Labor Relations Act in certain respects and we have been ordered to post this notice.

WE WILL NOT prohibit representatives of Local 919, United Food and Commercial Workers, AFL-CIO ("the Union") or any other labor organization, from distributing union literature to our employees in the parking lot adjacent to our store in Newington, Connecticut, nor will we attempt to cause them to be removed from our parking lot for attempting to do so.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of rights guaranteed them in Section 7 of the Act.

LECHMERE, INC.
(Employer)

Dated: _____ By: _____
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Region 34, 1 Commercial Plaza, Hartford, Connecticut 06103-3599, Telephone 203-240-3373.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 89-1683

LECHMERE, INC.,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

BEFORE

BREYER, Chief Judge,
CAMPBELL, Circuit Judge,
BOWNES, Senior Circuit Judge,
and TORRUELLA, SELYA and CYR, Circuit Judges.

ORDER OF COURT

Entered: October 25, 1990

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

Clerk

[cc: Messrs. Joy and Cohen]